Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

No. 79-1900

RICHARD JAMES FREEMAN,
Petitioner

VS.

O'NEAL STEEL, INC.,
a corporation, and
UNITED STEELWORKERS OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH E. COLEMAN, Esq.
2175 11th Court South
Birmingham, Alabama
35205

Attorney for Petitioner

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, RICHARD JAMES FREEMAN, respectfully prays that a writ of certiorari be issued out of and under the seal of this court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on the 15th Day of January, 1980, which judgment reversed the previous District Court Decision that the Respondent, UNION, had breached its duty of fair representation and that the Respondent, Company, violated its employment contract by wrongfully discharging the Petitioner.

The timely application for re-hearing in the United States Court of Appeals for

the Fifth Circuit was denied without an opinion on the 3rd Day of March, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit of Alabama has been reported at 609F.2d 1123, and is attached hereto in Appendix A, infra, pp. A1-A7.

The previous opinion of the Trial Court, the United States District Court of the Northern District of Alabama, J. Foy Guin, Jr. has been reported at 436 F. Supp. 607, and is attached hereto in Appendix B, infra, pp. B1-B7.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on the 15th Day of January, 1980, and is annexed hereto in Appendix A, infra, pp. A1-A7.

A timely petition for rehearing was denied on the 3rd Day of March, 1980, and the judgment of the United States Court of Appeals for the Fifth Circuit thereon is attached hereto in Appendix A, infra, p. 8.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the United States Court of Appeals of the Fifth Circuit rendered the 15th Day of January, 1980, is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I.

Whether Petitioner is denied due process of law by the Fifth Circuit Court of Appeals' failure to recognize any conduct constituting "bad faith" thereby putting the Fifth Circuit at variance with the other circuit courts of appeals on essentially the same factual situations; the said Fifth Circuit Court of Appeals accomplishing this by refusing to apply in a duty of fair representation case Federal Rule of Civil Procedure 52 (a) but substituting its opinion for the finding of facts of the trial judge.

II.

Whether a review of the action of the Fifth Circuit Court of Appeals requiring the Supreme Court to exercise its supervisory powers over said court in that the Fifth Circuit failed and refused to recognize a duty of fair representation owed by the union to an employee by consistantly refusing to follow: Vaca vs. Sipes and Hines vs. Anchor Motor Freight, Inc. when the District Court had found after hearing oral testimony; bad faith, racial discrimination and arbitrary conduct on behalf of the union.

III.

Whether the petitioner's claim under the Labor-Management Relations Act §301 for wrongful discharge is barred by the decision of a joint grievance committee upholding the petitioner's discharge, notwithstanding that the petitioner's union

breached its duty of fair representation:

(a) In processing your petitioner's grievance so as to deprive the joint grievance committee of overwhelming evidence of similar cases where employees' grievances were found to be meritorious while conversely allowing the grievance committee to only review labor cases where employees lost arbitration under similar factual circumstances;

(b) By first submitting the petitioner's meritorious grievance to arbitration, then abruptly withdrawing the same and then misrepresenting to the petitioner that the arbitrator denied his grievance on his failure to attend, when in fact the union had voluntarily withdrawn the grievance from arbitration?

STATUTES INVOLVED

Labor-Management Relations Act §301, 29 U.S.C. §185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, ..., may be brought in any district court of the United States having jurisdiction of these parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor orgainization which represents its employees in an industry affecting commerce under this act and any employer whose activies affect commerce as defined in this act shall be bound by the

acts of its agents, and any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States... .

STATEMENT OF THE CASE

The Petitioner, RICHARD JAMES FREEMAN filed his complaint on May 24, 1976 against O'Neal Steel, Inc. and United Steel Workers of America under §301 of the Labor-Management Relations Act, alleging wrongful discharge and bad faith (R 1). The case was tried on tne 25th of January, 1977 before the Honorable J. Foy Guin, Jr. without a jury. At the conclusion of the trial, the trial judge found bad faith, arbitrary conduct, and racial discrimination on the part of United Steel Workers of America and wrongful discharge and breach of contract by O'Neal Steel, Inc. within the purview of §301 of the Labor-Management Relations Act (R 222).

The trial court's findings were based upon: personal hostility(R 220), racial bias (R 221), misrepresentation (R 221), intentional omission of similar favorable labor cases before the union grievance committee (R 220), the union's attitude of "don't call us we'll call you"(R 220) and the absence of the petitioner or anyone on his behalf before the grievance committee at their last meeting prior to arbitration (R 221).

The court of appeals reversed trial court's holding and in so doing caused the petitioner to loose his back wages, pension benefits, reinstatement, and seniority (R 225) previously reinstituted by the trial court.

The discharge of petitioner who had been employed with the company for 27 years arose out of his being cut by a fellow employee who was also discharged (R 21,22). Petitioner is black and has a third grade education and has only one eye, and his discharge is tantamount to capital punishment. After he was discharged, petitioner filed a grievance and at the first three steps it was denied by the company and the petitioner was advised by the union that they would have his grievance go to arbitration. His fellow employee, who cut him, took no action to contest his discharge but petitioner sued him in the state court and recovered a $10,000.00 judgment for assault and battery (R 110) and also was compensated under workman's compensation for the injury received on the job as a result of being cut by his fellow employee (R 95,96).

Petitioner contacted the union on a number of occassions (R 72,178) as to the status of his grievance but was told in substance "don't call us we'll call you". Thereafter, he was told by a member of the grievance committee that his grievance had been dismissed by the arbitrator for his failure to attend the arbitration (R 73). Petitioner later learned when applying for unemployment that this was not true but that the union had withdrawn the grievance from arbitration (R 173, 174). On the trial of the case it was brought out that the union representative William Caldwell, who was white, presented to the union committee only cases where the discharge had been upheld by the arbitrator following an altercation (R 52), although he knew of cases where the discharge had been set aside under similar circumstances, these

were not presented to the committee.

The committee made its decision according to the testimony, based upon three reasons:

1. written statements taken by the company;
2. the outcome of arbitration cases adverse to petition presented by Caldwell, the union representative;
3. failure of petitioner attending a meeting of which the court found he was not informed (R 173,174).

The only black member of the committee, Ulysses Jones testified the petitioner didn't know of the meeting, that the union attempted to contact the petitioner but was unable to do so (R 208).

Based on the foregoing, the court found the union's withdrawal of the grievance was arbitrary, done in bad faith, racially discriminatory and a result of personal hostility on the part of the union representative, William Caldwell.

REASONS FOR GRANTING THE WRIT

I. The court below applied a standard of review inconsistant with the review applied by the circuit courts of appeals by refusing to lend credence to Rule 52(a) in the Federal Rules of Civil Procedure.

This case is one in which the standard of review applied by the court does conflict with the standard of review adopted by the other circuit courts of appeals. This case is one in which the standard of review applied by the court of appeals violates the intent of Congress and makes a mockery of the safeguards of §301 of the the Labor-Management Relations Act.

Bluntly stated, if this case is allowed to stand, it will be impossible for an employee to win a wrongful discharge case, the industrial equivalent of capital punishment, absent a confession or admission on the part of the union.

The other circuits in similar factual situations have consistantly found unfair representation on behalf of the union, where the Fifth Circuit Court of Appeals has not.

The Sixth Circuit in Ruzicka vs. General Motors Corp., 523 F. 2d 306 (6th Cir. 1975) held arbitrary conduct and perfunctory handling of grievance to exist where the union negligently allowed the grievance to expire.

Also, in a disputed factual situation similar to this one, the Sixth Circuit held that there was evidence supporting a finding that the union was in bad faith where the union failed to notify the Appellant of its decision not to process the grievance while the Appellant was calling to find out what was happening. Willetts vs. Ford Motor Co., 583 F. 2d 852 at 855 (6th Cir. 1978).

The Ninth Circuit, in Robesky vs. Quantos Empire Airways, Ltd., 573 F. 2d 1082 at 1090 (9th Cir. 1978) held that the unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee and that actual omissions "may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to the legitimate union interest as to be arbitrary"

and that under facts of that case that failure in inform the Appellant that her grievance had been withdrawn from arbitration, could be termed arbitrary conduct.

The First Circuit in Soto Segarra vs. Sea Land Service Co., Inc., 581 F. 2d 291 at 295 (1st Cir. 1978) found arbitrary conduct where the Appellee addressed unconditional requests to process his grievance and received no response. Also, in that case, the District Court's findings of the local's breach of its duty of fair representation by thwarting the employee's attempt to exhaust the grievance procedure was based a large part on historical fact, credibility of witnesses, and inferences. The First Circuit expressly upheld the findings of the trial judge (at 296) based upon its observation of the witnesses.

The Fifth Circuit has developed a pattern of refusing to find unfair representation on behalf of the union and except for one jury trial, Lowe vs. Pate Stevedoring Company, 558 F. 2d 769 as corrected on denial of rehearing Dec. 5, 1977 (5th Cir. 1977); the court of appeals has not upheld a single finding of unfair representation.

The result reached in the court below in substituting its own judgment for that of the trial court is at war with the intent of Congress in making the union the exclusive representative of the employee. The union is held to the standard of complete good faith and honesty of purpose in its dealings on behalf of the employees it represents, Hines vs. Anchor Motor Freight, Inc, 424 U.S. 553 (1976).

What happens when the union is allowed to circumvent the standards as set out in Hines, supra? As in this case, the poor, under educated, and handicapped employee sufers beyond imagination.

The court below conveniently circumvented Rule 52 A of the Federal Rules of Civil Procedure by failing to address Rule 52A in its opinion, the rule which states in part: "...findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

When a trial court's findings are against the employee, the court below finds Rule 52A to be a "Buckler and Shield" on behalf of the union. Connally vs. Transcon Lines, 583 F.2d 199 (5th Cir. 1978). In this opinion, (Appendix A) the court does not even consider Rule 52A in their opinion. The effect of this "Two-Sworded" justice is obvious, the petitioner is severely handicapped in his ability to win on appeal.

Where as, here the federal courts are abrogating the rights of the employees who are members of unions by their failure to uphold safeguards intended by Congress and the people of this courtry, such results show that the time has come for this court to review this case and resolve the conflict currently existing among the circuits.

II. The court of appeals has not adhered to the standards as set forth in Vaca vs. Sipes and Hines vs. Anchor Motor Freight, Inc. in reversing the trial

court's findings of bad faith, discrimination and arbitrary conduct on the part of the union.

In Vaca vs. Sipes, 386 U.S. 171 (1967) this court stated that a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory. or in bad faith. The court further stated that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion... .

This court also held in Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554, at 571 (1976) "that Congress has put its blessings on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity ...as the court of appeals for the Ninth Circuit put it in Margetta vs. Pam Pam Corporation, 501 F.2d 179, at 180 whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation. Petitioners, if they prove an erroneous discharge and the unions breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the union."

The court of appeals did not adhere to the standards set forth in Vaca vs.

Sipes and Hines vs. Anchor Motor Freight, Inc., supra, in reversing the trial court's findings of bad faith, discrimination and arbitrary conduct on the part of the union and wrongful discharge and breach of contract on the part of the company.

The court below has consistantly failed to uphold findings of unfair representation pursuant to §301 of the Labor-Management Relations Act. In fact, only one time in, Lowe vs. Pate Stevedoring Co. 558 F.2d 769 as corrected on denial of rehearing Dec.5, 1977 (5th Cir. 1977) as the court of appeals upheld a lower court's finding of unfair representation. It is also important to note the court has never upheld a trial judge's finding of unfair representation in a §301 action. In Lowe, supra, the court reversed the trial court's judgment notwithstanding the verdict which had previously reversed the juries verdict of unfair representation on behalf of the union. The post Vaca cases are as follows:

Watson vs. INT Brotherhood of Teamsters, 399 F.2d 875 (5th Cir. 1968);

Lomax vs. Armstrong Cork, Co., 433 F.2d 1277 (5th Cir. 1970);

Encina vs. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971);

Harris vs. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1972);

Turner vs. Air Transport Dispatcher, 468 F.2d 297 (5th Cir. 1972);

Sanderson vs. Ford Motor Company, 483 F.2d 102 (5th Cir. 1973);

Mumford vs. Glover, 503 F.2d 878 (5th Cir. 1974);

Bures vs. Houston Symphony Society, 503 F.2d 842 (5th Cir. 1975);

Tedford vs. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976);

Burchfield vs. United Steelworkers of America, AFL-CIO, 577 F.2d 1018 (5th Cir. 1978);

Connally vs. Transcon Lines, 583 F.2d 199 (5th Cir. 1978);

Franklin vs. Crosby Typewriter Co., 568 F.2d 1098 (5th Cir.) cert denied 439 U.S. 847, (1978);

Coe vs. United Rubber Workers, 571 F.2d 1349 (5th Cir. 1978);

Cox vs. C.H. Masland and Sons, Inc., 607 F.2d 138 (5th Cir. 1978).

The failure of the court to find unfair representation indicates that the court is merely paying "lip service" to this court's holdings in Vaca and Hines, supra.

The court below, while reviewing the trial court's finding of arbitrariness on the part of the union, did not address the question of why the union's conduct was not arbitrary as per the findings of the trial court in its opinion. The court said simply, "Viewing the evidence as a whole, we can not agree that there is 'substantial evidence' to support the trial court's findings that the union's conduct toward

the plaintiff was arbitrary, discriminatory and in bad faith." (Appendix A, pp.).

The Fifth Circuit in attempting to define the arbitrariness standard has said: "...we think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of those factors; and (3) inclusive of a failure and impartial consideration of the interest of all employees." Tedford vs. Peabody Coal Company, 533 F.2d 952 (5th Cir. 1976).

The Tenth Circuit Court of Appeals in attempting to define "arbitrary" states: "an act done without adequate principle or an act not done according to reason and judgment" Foust vs. International Brotherhood of Electrical Workers, 572 F.2d 710 (10th Cir. 1978).

The Eighth Circuit Court of Appeals has defined "perfunctory" as: "without concern or solicitude; indifference." Goshey vs. ITT Life Insurance Corporation, 590 F.2d 741 (8th Cir. 1979).

The court of appeals' failure to address the question of what is arbitrary conduct and conversely, why under the facts of this case, the union's conduct is not arbitrary has prejudiced the rights of the petitioner. The burden of proof in proving conduct which is "arbitrary" is an easier burden of proof than proving conduct that is "bad faith". While misrepresentation and intentional omissions support a finding of bad faith as per the

trial court's opinion; they most assuredly would be termed arbitrary conduct on the part of the union. The facts of this case support a finding of willful conduct. This willful conduct does not meet the union's obligation to serve the interest of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honestly, and to avoid arbitrary conduct. Humphrey vs. Moore, 375 U.S. at 342 (1964).

The facts of this case rise to the standards specified by this court in Amalgamated Ass'n of Motor Coach Employees vs. Lockridge, 403 U.S. 274 (1971), that evidence of fraud, deceitful action, or dishonest conduct is necessary for a finding of unfair representation and that there must be evidence of discrimination which is intentional, severe and unrelated to union objectives. The misrepresentation and intentional omissions evidence deceitful action and/or dishonest conduct on the part of the union while the courts specific finding of racial discrimination and personal hostility on the part of the predominatly white labor union against a black employee meets the burden of proof set down in Lockridge, supra.

While the trial court did not find that the union's conduct in processing the petitioners meritorious grievance was perfunctory handling of the same, the misrepresentation, and intentional omissions, the attitude of "don't call us, we'll call you", and the lack of notice as to the final meeting of the committee, all indicate the perfunctory handling of the petitioner's meritorious grievance.

The petitioner's grievance was definitely meritorious, even the companies own arbitration expert, Hobart Grooms, thought that the employee (petitioner) had an excellent chance of winning the arbitration. (R 223) The statements of witnesses available to the union secured by the company prior to arbitration indicate that the petitioner was not the aggressor in the altercation but was merely defending himself (R 236-240) and the trial court's opinion coincides with this indication, specifically finding that the plaintiff was acting in defense of his property and that the opposing force or measure of defense which he used was not unreasonably disproportionate. (R 222)

The court below held that there was not substantial evidence to support a finding of unfair representation. This court has held that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support for conclusion. Richardson vs. Perales, 402 U.S. 389 (1971). The trial judges findings of fact, all of which are documented in the record on appeal, except the finding of personal hostility on the part of the union representative, certainly meet the "substantial evidence" standard by which the Fifth Circuit Court of Appeals reversed the findings of the trial judge.

It is respectfully submitted that in light of the court of appeals "track record" that there will never be "substantial evidence" to support a finding of unfair representation rendered by a trial judge. The rights of the petitioner are being subrogated by the refusal of the court of

appeals to uphold a finding of unfair representation. The court of appeals, is in effect, making a mockery of the duty of fair representation which in the past has stood as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor laws." Vaca vs. Sipes, 386 U.S. 171 (1967).

It is respectfully submitted that the court of appeals erred in not following this court's mandate in light of Vaca vs. Sipes and Hines vs. Anchor Motor Freight, Inc. supra, and further erred in its failure to find unfair representation on the part of the union through its bad faith, discrimination, arbitrary conduct, and perfunctory processing of the petitioner's meritorious grievance and the companies wrongful discharge of the employee and breach of contract.

III. Misrepresentation to the petitioner as to the union's acts and intentional omission of favorable labor cases before the union committee by the leader of that committee support a finding of unfair representation by the union.

The complete good faith and honesty of purpose standards set forth in Humphrey vs. Moore, supra, has been breached by the union's conduct of misrepresentation and intentional omission of favorable labor cases on behalf of the petitioner.

The court below held that "the alleged misrepresentation to the plaintiff concerning the status of his grievance is irrelevant since the misrepresentation, if it took place, would have occurred after

the alleged bad faith action." (Appendix A, pp. A-5) (emphasis added).

I respectfully submit that misrepresentation, whenever it occurs, is relevent in reaching a determination as to whether the union actions or inactions breaches its duty of fair representation to its members. In this type of action, the employee is attempting to prove bad faith, arbitrary conduct, deceit and discrimination on the part of the labor union. This type of action necessarily goes to the intent, motive, hostility, and conduct of the union in order to determine whether the union exercised its duty of good faith and honesty of purpose. In this case, misrepresentation occurring immediately after the union committee withdrew the employee's meritorious grievance is certainly probative of the union's intent, motive, and conduct toward the petitioner.

In addition, the court below failed to assess the cumulative effect of the trial court's findings. Yet, in other current cases, the court assesses the maximum possible cumulative impact of the court's findings. Cox vs. C.H. Masland and Sons, Inc., 607 F.2d 138 at 145 (5th Cir. 1979). The adverse effect on the petitioner from the court of appeals not assessing the cumulative effect of the trial court's findings is obvious; this "Two-Sworded" judicial review being especially critical in light of the fact that the trial court's holding of unfair representation was based on the "totality of the circumstances" (R 221).

The "totality of the circumstances" upon which the trial court bases its opinion, includes the personal animosity or

hostility of the key union representative, William Caldwell, for the petitioner. The trial court found, "the union representative, William Caldwell displayed an openly hostile attitude toward the plaintiff during his testimony at the trial of this cause"(R 220). This same union leader, who is white, intentionally omitted the favorable labor arbitration cases to the grievance committee deciding on whether or not to proceed to arbitration on behalf of the petitioner; this being especially harmful to the petitioner becaused the committee was "dominated and controlled by Caldwell" (R 221). The committee members testified at the trial that these unfavorable cases influenced their decision not to proceed to arbitration (R 173, 174, 206). As committee member Jack Ford testified, the unfavorable cases, the company statements of the witnesses, and the fact that the petitioner had not shown up for the meeting were the reasons why he felt the petitioner's case should not proceed to arbitration (R 173, 174). Yet, Ulysses Jones, the only black member of the committee, testified that the union never notified the petitioner of the meeting (R 208). Jones also listed the unfavorable cases and the company statements of the witnesses as the reasons why the committee decided against arbitration (R 206). The committe members in addition to their leader, Caldwell, were Louis Walters, Maurice Chandler, Ulysses Jones, and Jack Ford (R 176). The committee members Ford and Jones were both influenced by the unfavorable cases presented by Caldwell who was personally hostile towards the petitioner, and the decision not to proceed to arbitration was made by Ford, Jones,

Chandler and Caldwell (R 191). As evidenced by the record on appeal, a majority of the committee was influenced by either personal hostility or intentional misconduct on behalf of the union leader; and the negligence in lack of notification to the petitioner also influenced one member of the committe. Even the written statements taken by the company indicate that the petitioner was not the aggressor in the fight (R 177, 235-240).

While there is no doubt that Ford, Jones and Chandler attempted to make a reasonable decision based upon the material before them, I submit that a reasonable decision is impossible under the facts of this case as they were presented to the committee, which were false and misleading, and that the union's conduct shows discrimination, bad faith and arbitrary conduct as found by the trial court on the part of the union.

This court stated in Vaca vs. Sipes, 386 U.S. at 185 (1976), "we think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract in both the higher stages of the grievance procedure, and if, as alleged here, the employee-plaintiff has been prevented from exhausting his contractural remedies by the union's wrongful refusal to process the grievance. ..."

I respectfully submit that the decision of the joint union committee was tainted by the unfavorable labor cases presented to them by their leader William Caldwell, this taken into consideration

with the personal hostility on behalf of Caldwell towards the petitioner and the misrepresentation to the petitioner as to the status of his grievance, surely justify a finding of unfair representation based upon bad faith, discrimination, and arbitrary conduct as found by the trial judge.

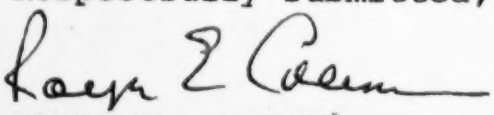
CONCLUSION

This being the discharge of a 55 year old black male, handicapped with only one eye and a third grade education, after twenty-eight years of service, just prior to a vested retirement ranks this particular cause, a case of industrial capital punishment of the first order. The lower court's findings of facts of actual misrepresentation of the grievance status to the petitioner, "bad faith" on the part of the union committee man, Caldwell, in presenting only adverse cases to the union committee, racial discrimination and personal hostility, meet the most stringent standards set forth in Vaca vs. Sipes, supra; Hines vs. Anchor Motor Freight, Inc., supra; and even rise to the standards much critized and set forth in Amalgamated Ass'n of Motor Carrier Employees vs. Lockridge, supra, evidencing fraud, deceit and dishonest conduct.

The supervisory power of this court is urgently needed to vitalize Vaca vs. Sipes, to make meaningful Rule 52A and to give equal protection under the law by eliminating the variance existing among the various circuits with the Fifth Circuit Court of Appeals.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



RALPH E. COLEMAN
2175 11th Court South
Birmingham, AL 35205

Counsel for Petitioner

APPENDIX A

Richard James FREEMAN, Plaintiff-Appellee,

v.

O'NEAL STEEL, INC., etc., et al., Defendants-Appellants.

No. 77-2649.

United States Court of Appeals, Fifth Circuit.

Jan. 15, 1980.

Appeal was taken from judgment of the United States District Court for the Northern District of Alabama, at Birmingham, J. Foy Guin, Jr., J., 436 F.Supp. 607, determining that union had breached duty of fair representation in refusing to pursue arbitration of grievance and that company had violated employment contract by wrongfully discharging union member. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) breach of union's duty of fair representation cannot be based on trial court's view regarding the probability of success on the merits of a grievance; (2) evidence did not support finding that union staff representative was personally hostile to plaintiff and that such hostility motivated union to withdraw grievance; and (3) on the evidence as a whole, there was not substantial evidence to support finding that union's conduct toward plaintiff was arbitrary, discriminatory, and in bad faith.

Reversed.

1. Labor Relations ⇐221

As exclusive collective bargaining agent for union member, union has statutory duty to fairly and without hostility or discrimination represent his grievance, but duty is not a ministerial one of satisfying each employee's demand at all costs. Labor Management Relations Act, § 301, 29 U.S.C.A. § 185.

2. Labor Relations ⇐221

Breach of union's duty of fair representation cannot be based on trial court's view regarding the probability of success on the merits of a grievance.

3. Labor Relations ⇐221

It is within union's discretion to discontinue grievance procedure prior to selection of an arbitrator, but such discretion is not boundless and is confined by duty to investigate grievance and determine its merit.

4. Labor Relations ⇐766

Fact that member of union grievance committee asked grievant not to call him at night about the progress of the grievance was reasonable and did not evidence hostility by the union, for purposes of establishing breach of union's duty of fair representation in not proceeding with arbitration of the grievance.

5. Labor Relations ⇐221

It is not essential that grievant be present when union decides whether to pursue grievance, and lack of notice to grievant of meeting at which decision is made is not determinative on issue of good faith in relation to union's duty of fair representation.

6. Labor Relations ⇐221

Refusal to arbitrate grievance, if motivated by racial bias, would constitute breach of union's duty of fair representation, but there must be evidence to support such a finding.

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7. Labor Relations ⇐765

Alleged misrepresentation to grievant concerning the status of his grievance was irrelevant to the issue of union's breach of duty of fair representation where the misrepresentation, if it took place, occurred after the alleged bad-faith action in not proceeding with arbitration of the grievance.

8. Labor Relations ⇐766

Demeanor of a witness at trial may be considered in evaluating the credibility of that witness, but cannot by itself uphold a finding of union hostility toward grievant, for purposes of establishing breach of union's duty of fair representation in not pursuing grievance; there must be independent evidence of hostility or unfair treatment.

9. Labor Relations ⇐766

Fact that union staff representative told union committee deciding on whether to pursue arbitration of grievance only about similar cases decided against grievants in arbitration and not cases decided in grievants' favor was not sufficient to constitute substantial evidence of unfairness, for purposes of establishing breach of union's duty of fair representation.

10. Labor Relations ⇐766

In light of fact that union had notarized statements from eyewitnesses making it appear that grievant was the aggressor in fight which led to discharge of both participants in the fight and in light of facts that union investigated the discharge and pressed grievance to second and third steps of contractual procedure, there was no substantial evidence to support trial court's finding that union's conduct in not proceeding with arbitration of grievance was arbitrary, discriminatory or in bad faith in breach of union's duty of fair representation.

Appeals from the United States District Court for the Northern District of Alabama.

Before COLEMAN, Chief Judge, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge.

Appellants United Steelworkers of America [union] and O'Neal Steel, Inc. [company] appeal the district court's decision that the union breached its duty of fair representation by arbitrarily, discriminatorily and in bad faith refusing to pursue arbitration of appellee Richard James Freeman's grievance and that the company violated its employment contract by wrongfully discharging Freeman. We find that the district court misapplied the test used to determine whether a union's failure to complete arbitration is a breach of its duty. Accordingly, we reverse.

Freeman, a union member, and a coworker, Landrum, were both discharged after a fight on company property over possession of a calendar. The union contract with the company contains a three-step grievance procedure and a right of appeal to arbitration. The union filed Freeman's [1] grievance in the second step

1. Landrum, appellant's co-worker, did not file a grievance because he said that both parties were guilty in altercation.

of the grievance procedure in accordance with the provision permitting the first step to be bypassed in discharge cases. The company denied the grievance in the second and third steps and the union appealed the grievance to arbitration.

Because the union and company could not agree on arbitrators to comprise the arbitration panel, they requested a panel from the Federal Mediation and Conciliation Service. After a list of potential arbitrators was received, the union committee responsible for processing grievances met and decided to withdraw the grievance from arbitration based on the consensus that the grievance could not be won in arbitration. The meeting was attended by the union staff representative Caldwell and all but one of the members of the union committee, but not by plaintiff. The union also consulted with the union's director and the union's attorney.

Freeman then filed suit against the company and the union seeking injunctive relief and damages. Following a bench trial, the trial judge found that the union did breach its duty of fair representation and that the discharge was wrongful.

The issue before us is whether the union's failure to pursue arbitration in this case was a breach of its duty of fair representation.

[1] As exclusive collective bargaining agent for Freeman, the union had a statutory duty to fairly and without hostility or discrimination represent his grievance.[2] *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). However, as we recently indicated in *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979), the duty to fairly represent all of the employees in the bargaining unit is not a ministerial one of satisfying each employee's demand at all costs:

> [T]he union is the representative but not the servant of the employees. It not only may, but should, exercise judgment and discretion in its representative capacity. Its duty is violated "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."

Id. at 142 (quoting from *Vaca v. Sipes*, 386 U.S. at 190, 87 S.Ct. 903).[3] The key question then, is whether the union in this case abused its discretion and acted in an arbitrary or discriminatory manner or in bad faith when it decided not to proceed with arbitration of the plaintiff's grievance.

The trial court determined that the circumstances surrounding the withdrawal of plaintiff's grievance from arbitration by the union committee supported a finding of bad faith by the union and arbitrary and discriminatory conduct on its part. This conclusion was based upon the following findings: (1) Plaintiff had an excellent chance of winning the arbitration. (2) It was arbitrary for the union not to proceed at least to the point of selecting an arbitrator. (3) The union, particularly the union representative, displayed a hostile attitude toward plaintiff.

2. As a union member, appellee is precluded from any other representation in the collective bargaining process.

3. *See also Connally v. Transcon Lines*, 583 F.2d 199 (5th Cir. 1978) *and Franklin v. Cross-by Typesetting Co.*, 568 F.2d 1098 (5th Cir.), *cert. denied*, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978).

[2] It is settled law[4] that a breach of the fair representation duty cannot be based on the trial court's view regarding the probability of success on the merits of a grievance. We expressed this principle in *Turner v. Air Transport Dispatchers' Association*, 468 F.2d 297, 299 (5th Cir. 1972):

> As *Vaca* makes clear, unions should have considerable discretion to control the grievance and arbitration procedure, subject only to a duty of fair representation . . . and an employee is subject to the union's nonarbitrary discretionary power to settle or even abandon a grievance, *even if it can be later demonstrated that the employee's claim was meritorious.*

(emphasis added).

[3] If it is within a union's discretion not to file a grievance, it certainly is within its discretion to discontinue the grievance procedure prior to selection of an arbitrator. Thus, "A union's broad discretion in prosecuting grievance complaints includes not only the right to settle the dispute short of arbitration but also to refuse to initiate the first steps in the appeal procedure when it believes the grievance to be without merit." *Id.* at 300.[5]

The court's finding that the union and its representative, William Caldwell, were hostile to the plaintiff was based upon these factors: (1) Caldwell displayed an openly hostile attitude toward the plaintiff during the trial. (2) Caldwell advised the union committee considering plaintiff's grievance only about similar cases in which a grievant lost in arbitration but not cases won by the grievant. (3) A member of the union committee, erroneously identified by the court as Caldwell, told the plaintiff to stop calling him at night, which, according to the court, exhibited a "don't call us, we'll call you" attitude toward the grievant. (4) The plaintiff was not present at the meeting at which the decision was made not to proceed with his arbitration. (5) The union's decision was motivated by racial bias. (6) The committee represented to the plaintiff that his grievance had been turned down by the arbitrator, when in fact the grievance had been withdrawn.

4. In *Vaca* the Supreme Court held:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

386 U.S. at 192-193, 87 S.Ct. at 918.

See also Moore v. Sunbeam Corp., 459 F.2d 811, 820 (7th Cir. 1972), in which then Judge Stevens noted that:

> The Supreme Court in *Vaca* left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith.

5. In *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971), we stated: "[I]n its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances, *to abandon processing of a grievance which it determines in good faith to be meritless*, and to settle disputes with the employer short of arbitration." (emphasis added)

See also Melendy v. United States Postal Service, 589 F.2d 256 (7th Cir.), *cert. denied*, 436 U.S. 927, 98 S.Ct. 2821, 56 L.Ed.2d 770 (1978) and *Buchanan v. NLRB*, 597 F.2d 388 (4th Cir. 1979).

[4] Most of these factors need not detain us. The fact that a member of the committee asked plaintiff not to call him at night about the progress of the grievance was a reasonable request and did not evidence hostility by the union. It certainly did not show hostility on Caldwell's part since it was not Caldwell who was called.

[5] There is a dispute in the record as to whether the plaintiff was given notice of the meeting. However, lack of notice is not determinative on the issue of good faith. It is not essential that the grievant be present when the union decides whether to pursue the grievance. *Whitten v. Anchor Motor Freight*, 521 F.2d 1335 (6th Cir. 1975), *cert. denied*, 425 U.S. 981, 96 S.Ct. 2188, 48 L.Ed.2d 807 (1976).

[6] The trial court's finding of fact that the union's decision not to press the grievance was based on racial bias is a conclusory statement unsupported by any evidence. While a refusal to arbitrate, if motivated by racial bias, would constitute a breach of the duty of fair representation, there must be evidence to support such a finding.

[7] The alleged misrepresentation to the plaintiff concerning the status of his grievance is irrelevant since the misrepresentation, if it took place, would have occurred *after* the alleged bad faith action.

We are thus left only with the court's finding that Caldwell was personally hostile to the plaintiff.[6] This finding was based on Caldwell's demeanor during trial and the fact that he advised the committee of similar cases lost by a grievant in arbitration but not cases won by a grievant.

If in fact the union representative was hostile to the plaintiff *and* the decision not to pursue the grievance was influenced by his hostility rather than by appropriate considerations, then the decision that the union breached its duty of fair representation must be upheld. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[8] Here the trial judge did not find, nor could he find on the record, that Caldwell's hostility motivated the union to withdraw the grievance from arbitration.[7] Furthermore, the demeanor of a witness at trial may be considered in

6. The trial court ignored the fact that when appellee was discharged in 1971 for refusing to work overtime, Caldwell handled his grievance. The arbitrator there held that Freeman was at fault but that discharge was disproportionate to the offense and reduced it to two months' suspension without pay.

7. In *Melendy v. United States Postal Service*, 589 F.2d 256 (7th Cir. 1978), *cert. denied*, 436 U.S. 927, 98 S.Ct. 2821, 56 L.Ed.2d 770 (1978), the plaintiff contended the union representative harbored personal hostility toward him and for that reason had refused to take his grievance to arbitration. The court summarized the evidence relied on by plaintiff:

> Melendy attempted to create an inference that Zych [the union representative] showed "personal hostility (or lack of respect) toward Melendy," by Zych's statements in his deposition that he recalled Melendy used an unflattering term in referring to a judge whom Melendy felt he should sue, that Zych thought Melendy had "a little vindictive attitude," that Zych stated "I can tell you a number of vendettas he (Melendy) told me about," and that Zych testified of being told by the local union president that Melendy was "a real hothead."

The Court held that this evidence was insufficient to show any hostility and that "These statements simply fail to put into controversy Zych's uncontradicted statement that the settlements were based solely on his assessments of the merits." *Id.* at 259, n. 3.

evaluating the credibility of that witness, but it cannot by itself uphold a finding of union hostility.

In effect, the court held that since Caldwell was hostile in court, his testimony that the decision not to pursue the grievance was legitimately made after a careful review of the merits of the case must be disbelieved and the opposite conclusion—i. e. that the decision was based on factors other than the merits of the case—is established as fact. This is simply not the law. *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 71 S.Ct. 428, 95 L.Ed. 547 (1951).[8] There must be independent evidence of hostility or unfair treatment of the plaintiff to uphold the trial judge's finding of hostility based on courtroom demeanor.

[9] The court found additional evidence of the alleged hostility of Caldwell to the plaintiff in the fact that Caldwell told the committee only about similar cases decided against a grievant in arbitration but not the cases decided in a grievant's favor. However, this is not sufficient to constitute substantial evidence of unfairness. The union representative is not a lawyer and he cannot be expected to function as one. Furthermore, the committee members indicated that prior case law was not the only factor considered; they examined all contents in the file of benefit to the plaintiff.

[10] Viewing the evidence as a whole we cannot agree that there is "substantial evidence" to support the trial court's finding that the union's conduct toward plaintiff was arbitrary, discriminatory, and in bad faith. *Bures v. Houston Symphony Society*, 503 F.2d 842 (5th Cir. 1974).[9]

As heretofore noted, the union must be given some discretion in deciding whether to request that a grievance be taken to arbitration. This discretion is not boundless.[10] Its limits are discussed in *Cox v. Masland*:

> [I]n *Turner v. Air Transport Dispatchers' Assoc.*, 5 Cir. 1972, 468 F.2d 297, we held that a union's discretion is confined by the duty to investigate the grievance and determine its merit. *Id.* at 299. *Accord Steinman v. Spector Freight System, Inc.*, 2 Cir. 1971, 441 F.2d 599; *St. Clair v. Local 515, International Brotherhood of Teamsters*, 6 Cir. 1969, 422 F.2d 128. After doing so, the union is entitled to weigh the costs and benefits of going to arbitration, including the chances of success and the monetary cost. *See Encina v. Tony Lama Boot Co.*, 5 Cir. 1971, 448 F.2d 1264, 1265 (per curiam).

Id. at 145.

In the present case it is undisputed that the union investigated Freeman's

8. *See also Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952) and *United States v. Jenkins*, 510 F.2d 495, 499 (2d Cir. 1975).

9. To meet his burden of showing a reasonable probability of success upon the merits, Bures must prove arbitrary or bad faith conduct (the absence of honest purpose and judgment or the presence of hostility or discrimination) by the union. *Vaca v. Sipes, supra*, 386 U.S. at 193, 87 S.Ct. at 918. His proof of unfair representation must demonstrate "substantial evidence of fraud, deceitful action or dishonest conduct." *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d 473 (1971), reh. denied, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 120 (1972). The subjective suspicions aroused by the Players Committee's actions do not rise to this level. 503 F.2d at 844.

10. *See* Wyle, *Labor Arbitration and the Concept of Exclusive Representation*, 7 B.C. Ind. & Com.L.Rev. 783 (1966).

discharge, that it pressed Freeman's grievance through the second and third steps of the contractual procedure, that in preparation for the third step meeting the union conducted a reenactment of the fight, and that the union decided not to take the case through arbitration only after a special conference to consider all the facts and arguments for and against arbitration. These union actions demonstrate a serious consideration of Freeman's claim.

Both employees involved in the altercation were discharged. Presumably, then, it would have been unlikely for the plaintiff's grievance to succeed absent a showing that he was not the aggressor. Considering the fact the union had notarized statements from eyewitnesses making it appear that the plaintiff was the aggressor, it would have been difficult for the union to prove the contrary. In view of the above we cannot say that the union's assessment that there was little chance of success was unreasonable.

Because we find that the union's failure to pursue arbitration was not a breach of its duty of fair representation, we need not decide whether the discharge was a violation of the employment contract.

REVERSED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

March 3, 1980

TO ALL PARTIES LISTED BELOW:

NO. 77-2649 - Richard James Freeman v.
O'Neal Steel, Inc., etc., et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Susan B. Vaughn
Deputy Clerk

cc: Mr. George C. Longshore
Mr. William F. Gardner
Mr. Ralph E. Coleman

APPENDIX B

premiums. The Defendant would actually have no more exposure to direct liability if the red letter clause were eliminated, as long as its insurance coverage remained in effect. The Court fails to see how, in this factual context, the Defendant would have a greater incentive to conduct its operation in more prudent manner if the clause in question were eliminated.

Although the Court has found no cases in point, there are indications that these release of liability clauses would not be held void as against public policy in admiralty law.

In *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969), *rev'd on other grounds*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224, Chief Judge Brown, in analyzing a similar problem, stated in the Court's opinion,

> . . . we would certainly not consider for a moment in fashioning Federal law, that a contract to indemnify one against the consequences of the indemnitee's own negligence is contrary to public policy and thus void altogether, even though there is some division among the courts.[15]

The Court went on to quote from American Jurisprudence 2d what is considered to be the "general" rule,

> . . . a contract may validly provide for the indemnification of one against, or relieve him from liability for his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract.[16]

In the *Seckinger* case, the Court was considering the problem of whether an indemnity agreement obligated the indemnitor to indemnify the indemnitee for losses caused by the indemnitee's own negligence. Judge Brown there expressly rejected the proposition that such contracts were contrary to public policy. In the opinion of this Court, if contracts such as the one involved in the *Seckinger* case are not violative of public policy, then the release of liability clause found in the contract in the instant suit is not contrary to public policy. The public policy argument against both contracts would be almost identical.

The rule stated in the *Seckinger* case concerning indemnity agreements have also been stated and followed in *Transcontinental Gas Pipe L. Corp. v. Mobile Drill. Barge*, 424 F.2d 684 (5th Cir. 1970), and *Batson-Cook Company v. Industrial Steel Erectors*,[17] 257 F.2d 410 (5th Cir. 1958). The Court believes that these rules which pertain to indemnifying one against the consequences of one's own negligence are controlling in considering a clause which releases one from liability for his own negligence.

In summary, the Court holds that the contract between the parties released the Defendant from all liability to the Plaintiff and the Plaintiff is not entitled to receive any indemnity or contribution from the Defendant. The parties must lie in the bed that they themselves made.

Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact.

Richard James FREEMAN, Plaintiff,

v.

O'NEAL STEEL, INC., and United Steelworkers of America, Defendants.

Civ. A. No. 76-G-0721-S.

United States District Court,
N. D. Alabama, S. D.

June 30, 1977.

Action brought for injunctive relief and damages was predicated upon alleged

15. 408 F.2d at 150.

16. Id. at 150 n.9.

17. The *Batson-Cook* case contains an excellent listing of the authorities in the area at footnote 3 p. 412.

violations by employer and union of Labor Management Relations Act. The District Court, Guin, J., held that: (1) evidence established bad faith by union and arbitrary conduct on its part in withdrawal of plaintiff's grievance by union committee prior to completion of arbitration and (2) evidence established that employee had been acting in defense of his property at time of altercation with another employee and that the opposing force or measure of defense which he used in striking the other employee and jerking him to the ground was not unreasonably disproportionate to requirements of the occasion when the other employee was threatening plaintiff with a knife, thus employer should not have discharged plaintiff for assertion of that right and plaintiff was not discharged for just or proper cause.

Judgment for plaintiff.

1. Labor Relations ⇐221

As exclusive bargaining agent for employee as set out in collective bargaining agreement between union and employer, union had statutory duty to fairly represent employee's grievance filed as result of discharge. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. Labor Relations ⇐221

Duty of union to represent member with respect to grievance against employer does not confer absolute right on employee to have his grievance carried through all stages of grievance procedure. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. Labor Relations ⇐411

Individual employee, union member, does not have right to compel arbitration of his grievance against employer, regardless of its merits. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations ⇐764

Prerequisites to suit under Labor Management Relations Act against union on basis of failure to represent employee with respect to grievance are allegation and proof that union arbitrarily discriminatorily or in bad faith failed to exhaust contractual procedure. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

5. Labor Relations ⇐766

Evidence established bad faith by union and arbitrary conduct on its part in union committee's withdrawing grievance of discharged union member prior to completion of arbitration. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

6. Labor Relations ⇐770

Determination that union's failure to resort to arbitration violated union's statutory duty to employee and entitled employee to recover against union did not exempt employer from contractual damages which it would otherwise have had to pay. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

7. Labor Relations ⇐264

Evidence established that employee had been acting in defense of his property in altercation with another employee and that opposing force or measure of defense which he used in striking and jerking to ground the other employee was not unreasonably disproportionate to requirements of occasion, when the other employee threatened plaintiff with a knife, thus employer's discharge of plaintiff was arbitrary and discriminatory and in breach of his employment contract. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

8. Assault and Battery ⇐13

Person has right to defend himself from felonious attack and theft of his property, whatever its value.

9. Labor Relations ⇐759, 777

Appropriate remedy for employer's breach of employment contract and for breach of union's duty of fair representation varies with circumstances of particular breach. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

10. Labor Relations ⇐768, 778

Where employee's discharge was arbitrary and discriminatory and breached employment contract and union breached its

duty of fair representation of employee with respect to his grievance, union and employer were jointly and severally liable for any damages awarded employee, who was entitled to reinstatement, back wages, less wages earned from other employment, back contributions to employer's pension fund, credit of all time from his discharge toward obtaining vested interest in pension fund and seniority as if he had suffered no termination of employment. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Ralph E. Coleman, Birmingham, Ala., for plaintiff.

George C. Longshore, Cooper, Mitch & Crawford, Birmingham, Ala., for United Steelworkers.

William F. Gardner, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Ala., for O'Neal Steel.

MEMORANDUM OPINION

GUIN, District Judge.

This is a civil action for injunctive relief, damages, declaratory judgment, and other appropriate relief, brought pursuant to the Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185, and predicated upon alleged violations by the defendants, O'Neal Steel, Inc. (O'Neal), and United Steelworkers of America (Union), (hereinafter sometimes referred to collectively as "the defendants.")

The court, having fully considered the pleadings, all of the testimony, exhibits, and other evidence adduced in the course of this case, and having carefully reviewed the briefs, and having heard the arguments of counsel, now makes and finds the following facts, makes the following conclusions of law, and enters the following Memorandum Opinion:

MEMORANDUM OPINION

This action, seeking injunctive relief and damages, is predicated upon alleged violations by the defendants of Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). The action is properly before the court, subject matter jurisdiction existing under 28 U.S.C. § 1337, as an act arising under an act of Congress regulating commerce. Jurisdiction and venue were not contested by the parties.

The plaintiff is a black, unsophisticated, uneducated (third grade) and employee of O'Neal Steel, Inc., and a member of the United Steelworkers of America. Plaintiff had been employed, until his termination by defendant O'Neal, for a period of 27 years. Defendant O'Neal is a Delaware corporation, qualified to do business in the state of Alabama, with its principal place of business being located in Birmingham, Alabama. Defendant Union is a labor organization doing business in the state of Alabama. Plaintiff was employed by O'Neal from sometime during 1947 until January 17, 1975, when he was discharged as a result of an altercation in the plant with another employee, named Clarence Landrum. Landrum was also discharged from employment as a result of said altercation.

The altercation, which occurred on January 3, 1975, arose over a dispute between the plaintiff and Landrum as to a company-distributed calendar in the plaintiff's possession. Landrum attempted to take plaintiff's calendar from him and a scuffle ensued. Landrum grabbed the plaintiff's collar and the plaintiff grabbed Landrum's shoulder. Landrum had an open knife in his other hand. Plaintiff put his other hand on Landrum, jerking him to the ground Landrum got up and stabbed the plaintiff in the stomach with his knife. This altercation took place as a direct result of an attempt by Landrum to take from plaintiff property (a calendar) which legally belonged to him.

An investigation into this incident was conducted by O'Neal and, both persons being found at fault, Landrum was discharged on January 8, 1975, and plaintiff was discharged on January 17, 1975. As a result of this discharge, plaintiff lost a substantial interest in the O'Neal pension plan which would have become vested had he

continued in the employ of O'Neal. During the employment period from 1969 through 1976, no other employees were discharged for fighting on company property.

Plaintiff was a member of and was represented by the United Steelworkers of America and Local Union No. 3004 of United Steelworkers of America. This local is predominantly white. The Union contract with O'Neal contains a grievance procedure consisting of three steps, and a right of appeal to arbitration. In discharge and disciplinary suspension cases, the grievant may file the grievance in step two of the grievance procedure and bypass step one. The grievance on behalf of Mr. Freeman was filed in step two of the grievance procedure on January 21, 1975. Mr. Landrum did not file a grievance. The grievance was denied in step two by plant superintendent McCarley, and it was processed by the Union to step three. The grievance was denied in step three on February 10, 1975.

By letter dated February 27, 1975, the Union appealed the grievance to arbitration. After the Union and Freeman were unable to agree upon a list of arbitrators to compose an arbitration panel, the Union requested an arbitration panel from the Federal Mediation and Conciliation Service, from which Freeman and the Union would alternate striking names until the remaining name became the arbitrator for the case. The requested list of names to compose the arbitration panel was received by the Union and Freeman from the Federal Mediation and Conciliation Service. That list included H. Hobart Grooms, Jr., one of the witnesses in this case and who, on a previous occasion, had ruled in favor of the plaintiff regarding a grievance he had filed against O'Neal. By letter dated March 26, 1975, the Union advised O'Neal that it was withdrawing the grievance from arbitration.

The staff representative for the United Steelworkers of America with the responsibility for handling the plaintiff's grievance was William Caldwell.[1] Prior to withdrawal of the plaintiff's grievance from arbitration, Caldwell met with the Union committee responsible for such matters. This committee was composed of two whites and one black, in addition to Caldwell. Caldwell presented to the committee other arbitration cases involving fighting. All of the cases he presented to the committee favored the company and held against the grievant, despite the fact that there are many cases regarding the same subject which have held for the grievant and against the company. This committee made the decision to withdraw plaintiff's grievance from arbitration, and did so by letter dated March 26, 1975, as mentioned above.

As a result of the knifing inflicted upon the plaintiff by Landrum, medical and hospital bills in excess of $1,200.00 were incurred. Mr. Freeman was successful in obtaining a jury verdict in a civil action against Clarence Landrum.

Plaintiff had been discharged by O'Neal on a previous occasion (July 30, 1971) for refusal to work overtime. He filed a grievance as a result of this discharge, and was reinstated without pay by the arbitrator who presided over that grievance, H. Hobart Grooms, Jr.

[1] The court will first address itself to the question of whether the plaintiff has received fair representation by the defendant Union. As exclusive bargaining agent for the plaintiff, as set out in the collective bargaining agreement between the Union and O'Neal, the Union had a statutory duty to fairly represent the plaintiff's grievance. Under the fair representation doctrine, as set out in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967),

> the exclusive agent's statutory authority to represent all members of a

1. It is the function of a staff representative to assume responsibility for the overall management of a grievance, to act as a spokesman for the union and to provide a liaison function between the union and the company. Further, he is to serve as a "resident expert" on matters of the nature as that currently before the court and to advise the union and its various committees on the action they should take with regard to these matters.

designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

386 U.S. at 177, 87 S.Ct. at 910, 17 L.Ed.2d at 850. Thus, the duty which the plaintiff alleges has been breached is defined by three distinct standards of conduct; a violation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* 386 U.S. at 190, 87 S.Ct. at 916, 17 L.Ed.2d at 857. *See also Humphrey v. Moore,* 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *Ford Motor Company v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

The origin of the duty of fair representation is statutory, first recognized 20 years ago in a series of cases involving racial discrimination by unions certified as exclusive bargaining agents under the Railway Labor Act. *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1943). The Supreme Court subsequently held that the provisions of the National Labor Relations Act included a similar duty. *See Ford Motor Company v. Huffman, supra.* Freeman's complaint alleged a breach by the Union of a duty grounded on federal statutes, and therefore federal law governs his cause of action. *Vaca v. Sipes, supra.*

[2–4] The above-mentioned duty of representation does not confer an absolute right on an employee to have his grievance carried through all stages of the grievance procedure. There has been considerable debate on the extent of the duty owed to the employee.

> Some [authorities] have suggested that every individual employee should have the right to have his grievance taken to arbitration. Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as *racial discrimination or personal hostility.*

Vaca v. Sipes, 386 U.S. at 190, 87 S.Ct. at 917, 17 L.Ed.2d at 858. [Emphasis added.] *See also Turner v. Air Transport Dispatchers' Association,* 468 F.2d 297 (5th Cir. 1972). The individual employee does not have the right to compel arbitration of his grievance, regardless of its merits. As the court in *Boone v. Armstrong Cork Company,* 384 F.2d 285 (5th Cir. 1967) stated, citing *Vaca v. Sipes, supra,* a prerequisite to a Section 301 suit in such a case is allegation and proof that the union arbitrarily, discriminatorily or in bad faith failed to exhaust the contractual procedure.

[5] The circumstances surrounding the withdrawal of the plaintiff's grievance by the Union committee prior to completion of arbitration support a finding of bad faith by the Union and arbitrary conduct on its part, and in fact appear to the court to be both racially motivated (and therefore discriminatory) and the product of the personal hostility of Caldwell toward plaintiff. The facts surrounding the altercation between the plaintiff and Mr. Landrum certainly support the inference that had the case been presented to a fair-minded arbitrator, the plaintiff possessed an excellent chance of winning the arbitration. This contention is supported by the testimony of H. Hobart Grooms, Jr., a labor arbitration expert called by O'Neal. Upon questioning by the court, Mr. Grooms stated that Mr. Freeman would have a reasonable chance to win such an arbitration. Further, Mr. Grooms was a member of the arbitration panel from which the actual arbitrator would have been selected. Mr. Grooms had already restored the plaintiff to his job during a past arbitration. It was certainly arbitrary for the Union not to proceed at least to the point of determining who the actual arbitrator would have been.

The Union representative, William Caldwell, displayed an openly hostile attitude toward the plaintiff during his testimony in the trial of this cause. This hostility was plainly evident in Mr. Caldwell's demeanor on the witness stand, as well as by the

logical inferences the court has drawn from his testimony, including the fact that he in effect told plaintiff, "don't call us, we'll call you," intending to get rid of plaintiff and his complaint rather than to make a good faith effort to resolve it satisfactorily.

Indeed, Caldwell's entire conduct of this matter may be characterized as evidencing "bad faith." As mentioned above, in presenting the findings of previous arbitration cases to the Union committee dealing with this matter, Mr. Caldwell presented only cases adverse to the plaintiff's interest, while ignoring in his presentation any of the cases which support the plaintiff's position. This is particularly crucial in view of the fact that the Union committee was dominated and controlled by Caldwell. The composition of the committee was such that the members, essentially ignorant of such matters, had to rely heavily upon Mr. Caldwell's recommendations and experience in analyzing the factual circumstances surrounding any given situation and in reaching a conclusion as to how best to proceed. Further, the plaintiff was not present at the meeting at which the decision not to go forward with his arbitration was made, nor was he represented by anyone to present evidence on his behalf at this meeting. Caldwell's actions and demeanor, and the lack of any rational motive for his mistreatment of plaintiff, lead the court to further conclude that Caldwell was motivated by racial bias as well as personal hostility. For the purposes discussed above, Caldwell was the alter ego of the Union.

Finally, although there was conflicting testimony on this point, the court finds that the committee misrepresented to the plaintiff that his grievance had been turned down by the arbitrator, when in fact the grievance had been withdrawn by the Union committee. The totality of the above referenced circumstances leads the court to conclude that the Union has breached its duty of fair representation to the plaintiff.

[6, 7] Since the court has found that the Union's failure to resort to arbitration was itself a violation of the Union's statutory duty to the employee, the plaintiff is entitled to recover against the Union. However, having so held, there is no reason to exempt the employer from contractual damages which it would otherwise have had to pay, simply because the Union has breached its duty to the employee, if the plaintiff's discharge was a breach of the employment contract. *See Vaca v. Sipes, supra.* Turning, then, to a consideration of whether the discharge of the plaintiff by O'Neal constitutes a breach of contract by the employer within the purview of a Section 301 breach of duty action, pursuant to the Taft Hartley Act, the court finds that the plaintiff's discharge was arbitrary and discriminatory and in breach of his employment contract.

[8] In reaching this conclusion, the court has carefully reviewed the testimony and facts surrounding the plaintiff's discharge. As stated above, the defendant was protecting his personal property at the time of the attack by Landrum. Although the evidence reveals that plaintiff struck the first blow, at the time he struck this first blow he was being threatened by an open knife. (The defendants have admitted in their agreed summary of the facts in this case, as set forth in the pretrial order on file in this cause, that Landrum was threatening the plaintiff with a knife prior to the time the plaintiff struck and jerked Landrum to the ground.) Although the court may consider the defense of property of such small value to demonstrate poor judgment, or lack of wisdom, this court recognizes the well-established right of a person to defend himself from a felonious attack and the theft of his property, whatever its value. As the court in *State v. Wilson,* 5 Penn. 77 (Del. 1904) 62 A. 227, 231 stated,

> The law accords to everyone the right to protect his person from assault and injury by opposing force to force, and he is not obliged to wait until he is struck by an impending blow; for, if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow for the purpose of repelling and preventing the attempted injury.

The court specifically finds that plaintiff was acting in defense of his property and that the opposing force or measure of defense which he used was not unreasonably disproportionate to the requirements of the occasion. He clearly should not have been discharged by O'Neal for the assertion of this right.

Finally, as discussed above, even the defendant company's own expert, H. Hobart Grooms, Jr., who was called to give his opinion as a labor arbitrator as to the probable result of an arbitration case such as the plaintiff's, upon questioning by the court stated that under the circumstances he felt the plaintiff had a reasonable chance to win the arbitration. Therefore, the court cannot find that the plaintiff was discharged for just or proper cause.

[9, 10] The appropriate remedy for an employer's breach of the employment contract and for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. The difficulty here, as in the *Vaca* case, lies in fashioning an appropriate scheme of remedies. It is the court's opinion that both the Union and O'Neal are equally culpable in their wrongful actions toward the plaintiff. Accordingly, the court holds the Union and O'Neal jointly and severally liable for any amount of damages awarded to the plaintiff. In this regard, the court is of the opinion that the plaintiff is entitled to reinstatement to his employment with O'Neal Steel, payment of all back wages (less wages earned from other employment) from the time of his discharge to present, payment of back contributions to O'Neal's pension fund and credit of all time from plaintiff's wrongful discharge to the present toward obtaining a vested interest in the pension fund, and, finally, seniority as if the plaintiff had suffered no termination of employment from O'Neal Steel.

The parties shall have 30 days from the issuance of this order to submit to the court an amount based upon the evidence before the court which constitutes the back wages owing to the plaintiff. Further, the parties shall also submit to the court within 30 days the amount of back contributions due to be paid into the O'Neal pension fund.

Frank E. TURNER and Pam Turner, Plaintiffs,

v.

ROY BRIDGES MOTORS, INC., Defendant.

Civ. A. No. 76-G-0086-S.

United States District Court, N. D. Alabama, S. D.

June 30, 1977.

Buyers of used car brought action against used car dealer under Federal Declaratory Judgment Act and Civil Rights Act provision authorizing civil action for deprivation of rights, seeking injunctive relief, declaratory judgment, compensatory and exemplary damages, and other additional relief, based on allegation that operation of Alabama mechanic's lien statute, under which defendant refused to release car to plaintiffs until they paid for disassembly work performed on car, deprived them of their property without due process of law. On cross motions for summary judgment, the District Court, Guin, J., held that: (1) district court had jurisdiction over subject matter and parties to suit; (2) operation of Alabama's mechanic's lien statute did not constitute "state action" or action taken "under color of state law" and (3) there was no deprivation of plaintiffs' constitutional rights under Fifth and Fourteenth Amendments nor under Civil Rights Act.

Defendant's motion for summary judgment granted; plaintiffs' cross-motion for summary judgment overruled.

Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

vs.

O'NEAL STEEL, INC., a corporation,
and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT O'NEAL STEEL IN OPPOSITION TO PETITION

LUCIEN D. GARDNER, JR.
WILLIAM F. GARDNER
R. BOYD MILLER
Attorneys for Respondent
O'Neal Steel, Inc.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

vs.

O'NEAL STEEL, INC., a corporation,
and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT O'NEAL STEEL IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit on January 15, 1980 is reported at 609 F.2d 1123. The opinion of the District Court for the Northern District of Alabama on June 30, 1977, which was reversed by the Court of Appeals, is reported at 436 F.Supp. 607.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Since Petitioner's formulation of the questions consist principally of argument and assertions at variance with the record, they cannot be accepted. We submit that the question presented is simply whether the Court of Appeals' decision was within the legal principles governing a claim of alleged breach of the duty of fair representation by a union and alleged breach of a collective bargaining agreement by an employer.

COUNTERSTATEMENT OF THE CASE

The facts of the case are accurately stated in the Court of Appeals' opinion, and since Petitioner does not take issue with the facts as stated by the Court of Appeals, it should be unnecessary to recite the facts here.

Nevertheless, because Petitioner fails to set forth a number of undisputed facts, it is appropriate to present the following brief synopsis of the pertinent facts in order to show that the picture painted by Petitioner is far from accurate and to assist this Court in gaining a true understanding of the material facts in this case.[1]

A. Facts

On January 3, 1975, Petitioner R. J. Freeman ("Freeman") and another employee at O'Neal Steel engaged in a fight on Company premises. (R. 61-65, 235-240). The Company conducted an investigation of the incident and took statements from employees (all Union members) who witnessed all or parts of the fight. (R. 138, 235-240). On the basis of the investigation, the Company discharged both employees. Assisted by the Union, Freeman filed a grievance requesting reinstatement. (R.

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[1] It should be emphasized that these are undisputed facts; when necessary, a material dispute is recognized.

69, 166, 244). The other employee declined to file a grievance, saying that both parties were guilty in the fight. (R. 13, 154-155). The grievance was filed in the second step of the grievance procedure. (R. 231, 244). It was denied by the Company and was appealed to the third step by the Union. (R. 231, 246).

Before the third step meeting, the Union requested copies of the statements the Company had taken from the witnesses to the fight. (R. 177, 231). Freeman was informed of the contents of these statements by the Union and asked if he knew of other witnesses that could help his case. He identified two other employees as potential witnesses and, in addition, asked the Union to check with the employees who had given the statements to see if they would repudiate their statements or "change their testimony." (R. 148-150, 179). The Union thereafter sought out the witnesses identified by Freeman, but neither had any personal knowledge of the incident. (R. 49, 150, 185). The Union also interviewed the employees who had given statements concerning the fight. (R. 172, 179, 201). Each of these employees stood by his statement as correct, and the employee closest to the fight stood by his statement that Freeman had been an active participant and had struck the first blow in the affray.[2] (R. 44-45, 138, 179, 202).

Also prior to the third step meeting, the Union met with Freeman to discuss the matter and conducted a mock reenactment of the fight. (R. 167, 168, 180, 181). At the third step meeting, the Union advocated Freeman's cause and made a plea for leniency from the Company. (R. 231). After the grievance was denied at the third step, the Union notified the Company that it was taking the case to arbitration. (R. 249). It was un-

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[2] The undisputed evidence shows that Freeman went to a Union meeting during this period and openly chastised Union members for giving the statements. (R. 211).

disputed that since the collective bargaining agreement contains time limits on the processing of a grievance, the Union had to take this step to keep the grievance within those time limits and that it is common for grievances to be appealed to arbitration and then withdrawn. (R. 26, 209, 232).

On March 21, 1975, three members of the Union Committee met with Union Representative William Caldwell to discuss a number of pending matters, including Freeman's grievance. (R. 28-29, 191).[3] They discussed the grievance and agreed that in light of, among other things, the statements adverse to Freeman given by witnesses to the fight (which the witnesses declined to repudiate despite Freeman's efforts to have them do so) and prior arbitration cases upholding discharges for fighting, the grievance would probably be lost and therefore should be withdrawn. (R. 29, 173-174, 206-207).

B. District Court Decision

Freeman thereafter sued the Union and the Company, alleging that the Union had breached its duty of fair representation and that the Company had breached the collective bargaining agreement. (R. 1). The case was tried non-jury on January 24, 1977. Several months later, on June 30, 1977, the District Court entered a Memorandum Opinion holding that:

(1) The Union violated the duty of fair representation because:

(a) the plaintiff possessed an excellent chance of winning the arbitration. (R. 220).

(b) it was certainly arbitrary for the Union not to proceed at least to the point of selecting an arbitrator. (R. 220).

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[3] The local union president, Louis Walters, was unable to attend that day due to personal matters. (R. 190).

(c) Union representative William Caldwell displayed a hostile attitude toward the plaintiff while testifying at the trial. (R. 220).

(d) Union representative Caldwell's actions and demeanor displayed racial bias. (R. 221).

(2) The plaintiff was discharged in breach of the collective bargaining agreement. The District Court based this holding on a criminal law principle, stating that:

> "[T]his court recognizes the well-established right of a person to defend himself from a felonious attack and the theft of his property, whatever its value. As the court in *State* v. *Wilson,* 62 A. 227, 5 Pennewill 77 (Del. 19),[4] stated,
>
> > 'The law accords to everyone the right to protect his person from assault and injury by posing force to force, and he is not obliged to wait until he is struck by an impending blow; for, if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow for the purpose of repelling and preventing the attempted injury.'
>
> 62 A. at 231. The court specifically finds that plaintiff was acting in defense of his property and that the opposing force or measure of defense which he used was not unreasonably disproportionate to the requirements of the occasion. He clearly should not have been discharged by O'Neal for the assertion of this right." (R. 222).

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[4] The date of the decision in the case cited by the District Court was omitted in the District Court's Memorandum Opinion.

C. Court of Appeals Decision

On appeal, a unanimous panel of the Court of Appeals reversed on the ground that the District Court's decision was not in conformity with the principles governing cases alleging a breach of the fair representation duty and that there was not substantial evidence of a breach of the duty by the Union. Since this was conclusive of the case,[5] there was no occasion to reach the point that the District Court's use of the criminal law "armed robbery" theory to decide the grievance was contrary to the principle that a court, in performing the function of a labor arbitrator, is confined to the collective bargaining agreement and that a ruling based on anything else is unenforceable.

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[5] "To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines* v. *Anchor Motor Freight,* 424 U.S. 568 (1976).

SUMMARY OF ARGUMENT

Petitioner's first argument, that the Fifth Circuit did not adhere to Rule 52(a) of the Federal Rules of Civil Procedure, is without merit since the appellate courts are clearly not bound to uphold erroneous or irrelevant findings of fact or conclusions of law. 5A *Moore's Federal Practice,* ¶52.03[2], at 2262 (2d ed. 1980).

Petitioner's second argument, that the standard the Fifth Circuit applied in this case is inconsistent with the standards applied in the other Circuits, is similarly devoid of merit since the facts of these cases are not fungible goods and the facts of the cases cited by Petitioner do not parallel the facts of this case.

Petitioner's next argument, that the Fifth Circuit has not been applying the standards of *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976), is based on nothing more than a misleading listing of cases with no attempt to show any way in which those cases allegedly conflict with *Vaca* and *Hines.*

Petitioner's final argument (which is essentially a reiteration of his basic contention), that the Court of Appeals erred in not accepting the District Court's holding that the evidence showed a violation of the fair representation duty, is without merit because the Court of Appeals correctly applied the governing principles. Indeed, it will be evident that it was not the Fifth Circuit's opinion, but rather the District Court's opinion, which contained glaring errors of law making reversal not only necessary but inevitable.

ARGUMENT

I.

Petitioner's Argument That The Fifth Circuit Refuses To Apply FRCP 52(a) Is Without Merit

In response to Petitioner's contention that the Fifth Circuit circumvented FRCP 52(a), it is enough to observe that Rule 52(a) was never intended to limit an appellate court's power to correct errors of law. See 5A *Moore's Federal Practice,* ¶52.03 [2], at 2662 (2d ed. 1980). In this case, the District Court's holding was clearly out of harmony with applicable law as established by this Court and followed by the other Courts of Appeals, and the Court of Appeals was correct in reversing it.

Thus, the District Court's reliance on the opinion that "the plaintiff possessed an excellent chance of winning the arbitration" was contrary to the principle that a union's representation may not be judged by the views of a court as to the merits of the grievance. This Court settled that principle in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), as follows:

> "Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.—
>
> "[T]he standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the

grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

Accordingly, as Justice (then Judge) Stevens stated in *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972):

> "The Supreme Court in Vaca left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith."

The application of this principle is also illustrated by the following examples:

> "In resolving the issue of fair representation, appellants seek to involve us in a consideration of the merits of their seniority claim. It is not, however, the function of the court to inquire into the merits of appellants' grievance." *Simberlund* v. *Long Island R. Co.*, 421 F.2d 1219 (2nd Cir. 1970).

* * *

> "The actual propriety of the grievant's discharge is immaterial to the strength of a Vaca-type action; the real issue is whether or not the union acts in good faith when it determines that the discharge is proper within the meaning of the applicable collective bargaining agreement.—This is so even if the grievance has merit." *Hilliard* v. *Armco Steel Corp.*, 421 F.Supp. 658 (W.D. Pa. 1975), aff'd, 532 F.2d 746 (3rd Cir. 1976).

Similarly, the District Court's holding that it was arbitrary for the Union not to proceed to the point of selecting an Arbitrator was manifestly at odds with the principle that a union is not obligated to take a grievance to arbitration. As this Court said in *Vaca* v. *Sipes,* supra:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."

This Court similarly stated in *Humphrey* v. *Moore,* 375 U.S. 335 (1964) that:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Similarly, in 1979, this Court reiterated the reasons underlying the principle. In holding in *International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42 (1979) that punitive damages may not be awarded for a breach of the fair representation duty, the Court stated that:

> "Additionally, the prospect of punitive damages in cases such as this could curtail the broad discretion that Vaca afforded unions in handling grievances. We there rejected the notion that employees could force unions to process their claims irrespective of the terms of the collective-bargaining agreement, and ruled that a union satisfies its

> obligation to represent employees fairly if it does not 'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.' Vaca v. Sipes, 386 U.S. at 191-194. In so holding, the Court stressed that union discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. Id., at 191, 193. Without these screening and settlement procedures, the Court found that the costs of private dispute resolution could ultimately render the system impracticable. Ibid."

It is accordingly settled that the fair representation duty does not obligate a union to file a grievance, does not preclude the withdrawal of a grievance once filed, and does not require that a grievance be appealed to arbitration. E.g., *Buchanan* v. *N.L.R.B.*, 597 F.2d 388 (4th Cir. 1979) ("The duty to avoid arbitrary conduct does not require a union to take every grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit. Without such discretion, a union's effectiveness as bargaining agent would be undermined.") and *Melendy* v. *United States Postal Service,* 589 F.2d 256 (7th Cir.), cert. denied, 436 U.S. 927 (1978) ("The union need not arbitrate every grievance. Vaca v. Sipes, 386 U.S. 171, 191-192, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The union has a duty to screen grievances and arbitrate only those the union believes are meritorious. Cf. Moore v. Sunbeam Corp., 459 F.2d 811, 819 (7th Cir. 1972).").

So also, the District Court's conclusion that the Union representative displayed a hostile attitude while testifying at the trial was a wholly impermissible use of courtroom demeanor, not to ascertain credibility, but to find an ultimate fact, contrary to the settled principle of evidence that a court's disbelief of a witness' testimony cannot be used to find a fact contrary to the testimony. *Nishikawa* v. *Dulles,* 356 U.S. 129, 137 (1958); *Moore* v.

Chesapeake & Ohio R. Co., 340 U.S. 573, 576 (1951). As the First Circuit said in explaining the reason for this principle in *Janigan* v. *Taylor*, 344 F.2d 781, 784-785 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965):

> "The reason must be obvious. Were the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary as a witness and arguing to the jury that he was not to be believed."

Similarly, the District Court's conclusion that the Union Representative was hostile and biased was not only based on a subjective reaction to his courtroom appearance but was as well the post-trial creation of an issue, because there was no allegation having anything to do with race in the complaint or in the pretrial order or at the trial. For example, the District Court's statement (repeated in this Court by the petition) that the Union is "predominately white" was based on no evidence whatever because race was not an issue.

In a like manner, the District Court relied on a "fact" which indisputably was not a fact at all when it stated that Union Representative Caldwell told Freeman "don't call us, we'll call you." There was never any contention that any such statement was made by Union Representative Caldwell. It was evidently a mistaken reference to the testimony of an employee member of the Union Committee who asked Freeman not to call him at night.

Moreover, the District Court's use of the criminal law armed robbery theory to hold that the discharge was in breach of the collective bargaining agreement was at odds with the principle that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As this Court said in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974):

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties."

In sum, while Rule 52(a) mandates that findings of fact shall be given controlling weight unless clearly erroneous, it does not require an appellate court to accept findings which are contrary to the governing legal principles, are based on no evidence, and are contrary to undisputed evidence. The District Court's decision was therefore correctly reversed by the Court of Appeals, and there the matter should end.

II.

Petitioner's Argument That The Fifth Circuit Applies A Standard Different From Other Circuits Is Without Merit

Petitioner has attempted to create a conflict in the Circuits situation by asserting that the standards applied by the Fifth Circuit in this type of case are at odds with the standards applied by other Courts of Appeals and that "the time has come for this court to review this case and resolve the conflict currently existing among the circuits." (Petition at p. 10). In actuality, no such conflict exists.

Petitioner cites four cases in support of the contention that the Fifth Circuit applies a standard inconsistent with the other Circuits in fair representation cases. Each of those cases, however, is clearly distinguishable from the present case.

For instance, in *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), the Sixth Circuit held that a union's unexplained failure to prevent a grievance deadline from expiring

constituted a breach of the duty of fair representation. Unlike the present case, in which the Union thoroughly investigated the incident, conducted reenactments of the fight, and appealed the grievance within the time limits, the union in *Ruzicka* did nothing. As the Court in *Ruzicka* explained, "The union made no decision as to the merits of Appellant's grievance, but merely allowed it to expire out of negligence and perfunctory handling." (523 F.2d at 310). Beyond question, the facts in *Ruzicka* in no way parallel the facts of this case, and it cannot be said that the result there reached was inconsistent with that in the present case.[6]

Similarly, the Sixth Circuit's decision in *Willets* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978) is inapplicable to this case. There the employee alleged he filed a grievance but the union did nothing. In the present case, the undisputed facts are that the grievance was vigorously prosecuted until the Union determined that it would be futile to continue with an arbitration and therefore withdrew it. Although what Petitioner was told about the Union's action on that date is disputed, it is beyond doubt he knew his grievance was no longer pending. It is equally beyond doubt that the Union actively investigated and pursued his grievance until it was concluded that there was little chance of succeeding at an arbitration.

The Ninth Circuit's opinion in *Robesky* v. *Quantos Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978), bears no relation to this case because the facts there showed that plaintiff was prejudiced by the union's negligent failure to inform her that her grievance had been allowed to expire. There, the employer of-

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[6]See Boyce, *Fair Representation, the NLRB, and the Courts* (1978), page 48:

> "In *Ruzicka,* the union breached its duty on two accounts. It made no decision on the merits and then negligently allowed the filing deadlines to pass."

fered the employee reinstatement without back pay subject to a probationary period. The employee, acting in the belief that her grievance was pending arbitration, refused the employer's compromise offer, only to discover later her grievance was not in fact pending and had been allowed to expire. Unlike the plaintiff in *Robesky,* the Petitioner in this case clearly suffered no such prejudice.

In *Soto Segarra* v. *Sea Land Service Co., Inc.,* 581 F.2d 291 (1st Cir. 1978), the union took no steps whatsoever to process the plaintiff's grievance, refusing to even respond to his letters requesting representation. To attempt to compare the *Soto Segarra* case to this case, in which the Union actively pursued the grievance, is plainly akin to comparing "apples to oranges."

The sum of it is that the Fifth Circuit continues to apply standards of law in fair representation cases that are consistent with the standards of law applied in the other Circuits. Any alleged inconsistencies are merely a product of factual distinctions and nothing more. Compare *NLRB* v. *Pittsburg Steamship Co.,* 340 U.S. 498 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.' "

III.

The Rulings Of The Fifth Circuit In Fair Representation Cases Are Entirely Consistent With *Vaca* v. *Sipes* And *Hines* v. *Anchor Motor Freight*

Having failed to establish any inconsistencies between the Fifth Circuit's approach to fair representation cases and the approach of other courts, Petitioner next argues that the Fifth Circuit does not adhere to the principles of *Vaca* v. *Sipes,* 386 U.S.

171 (1967) and *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976). The method used by Petitioner consists of listing fair representation cases decided by the Fifth Circuit and then arguing the cases demonstrate a failure to adhere to the applicable principles.

Since Petitioner is thus using the empirical method of presenting statistics from a sample group and drawing an inference therefrom, it is appropriate to point out that the usefulness of statistics "depends on all of the surrounding facts and circumstances" and that such evidence can be misleading. See, e.g., *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584-587 (1979); *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1379-1381 (5th Cir. 1974). A misleading result can be achieved by any number of means, including unfair comparisons, unrepresentative or inadequate samples, and unwarranted conclusions.[7] In this instance, Petitioner's sample falls prey to several of these pitfalls.

To begin with, Petitioner argues that the cases establish the Fifth Circuit has failed "to find" a breach of the duty of fair representation in the cited cases. We do not understand it to be the obligation of any court to "find" a breach of the duty of fair representation in any case unless the evidence warrants such a finding. But even more to the point, Petitioner has not undertaken any critique of these cases, individually or collectively, and makes no effort to establish that the result which was reached in any of these cases was inconsistent with the decisions in *Vaca* and *Hines.*

Furthermore, Petitioner has to a degree mis-represented the holdings of the cases he presents. Looking at Petitioner's presentation, it would appear at first blush that the Fifth Circuit

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[7]Croxton and Cowden, *Practical Business Statistics* 38-48 (3rd ed. 1960).

has reversed District Court determinations favoring plaintiffs in all fourteen of these cases. However, the facts are otherwise. Of the fourteen cases cited by Petitioner, ten did nothing more than affirm District Court rulings for defendants in fair representation suits.[8] Another of the cases vacated a preliminary injunction for a plaintiff in a fair representation suit because there was no showing of irreparable injury.[9] Another of the cases remanded a fair representation suit for a new trial.[10] Significantly, in only one of the cases cited by Petitioner did the Fifth Circuit outright reverse a District Court's ruling in favor of a fair representation plaintiff.[11] Petitioner's most egregious error comes, however, in claiming that *Mumford* v. *Glover,* 503 F.2d 878 (5th Cir. 1974) supports the view that the Fifth Circuit does not "find" fair representation violations. In truth, the Fifth Circuit in *Mumford* reversed and remanded a District Court decision which had favored the union and the employer in a fair representation case. Accordingly, the *Mumford* case, if anything, supports the view that the Fifth Circuit will, if necessary, unhesitatingly reverse an error of law which favors a defendant in a fair representation case.

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[8]*Cox* v. *C.H. Masland & Sons, Inc.,* 607 F.2d 138 (5th Cir. 1979); *Connally* v. *Transcon Lines,* 584 F.2d 199 (5th Cir. 1978); *Burchfield* v. *United Steelworkers of America,* 577 F.2d 1018 (5th Cir. 1978); *Coe* v. *United Rubber Workers,* 571 F.2d 1349 (5th Cir. 1978); *Franklin* v. *Crosby Typesetting Co.,* 568 F.2d 1098 (5th Cir.), cert. denied, 439 U.S. 847 (1978); *Turner* v. *Air Transport Dispatchers Ass'n.,* 468 F.2d 297 (5th Cir. 1972); *Encina* v. *Tony Lama Boot Co.,* 448 F.2d 1264 (5th Cir. 1971); *Harris* v. *Chemical Leaman Tank Lines, Inc.,* 437 F.2d 167 (5th Cir. 1971); *Lomax* v. *Armstrong Cork Co.,* 433 F.2d 1277 (5th Cir. 1970); *Watson* v. *International Brotherhood of Teamsters,* 399 F.2d 875 (5th Cir. 1968).

[9]*Bures* v. *Houston Symphony Society,* 503 F.2d 842 (5th Cir. 1974).

[10]*Sanderson* v. *Ford Motor Co.,* 483 F.2d 102 (5th Cir. 1973).

[11]*Tedford* v. *Peabody Coal Co.,* 533 F.2d 952 (5th Cir. 1976).

Moreover, Petitioner's assertion that there will never be "substantial evidence" to support a finding of unfair representation in the Fifth Circuit is belied by the Fifth Circuit's recent decision in a fair representation case. In *Abilene Sheet Metal, Inc.* v. *NLRB,* 619 F.2d 332 (5th Cir. 1980), the Court held that substantial evidence supported a finding of a breach of the union's duty of fair representation. (619 F.2d at 347).

Finally, it is noteworthy that Petitioner fails to mention the Fifth Circuit's well-known decision in *Local 12, United Rubber Workers* v. *NLRB,* 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967), which established that breach of the fair representation duty constitutes a violation of the National Labor Relations Act.[12]

It is further apparent that the Court of Appeals' decision was entirely in accord with *Vaca* and *Hines.*

This Court held in *Vaca* that "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined—" and that "we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." In the present case, the District Court's holding that it was arbitrary not to proceed to the point of selecting an Arbitrator was contrary to that holding of *Vaca,* and the Court of Appeals was right in reversing it. Similarly, *Vaca* held that a subsequent determination that a grievance had merit could not establish a violation of the fair representation duty. In the present case, the District Court's decision was contrary to that principle as well,

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[12]"The *United Rubber Workers* case was significant because it was the first case in which a federal court sustained the NLRB's exercise of jurisdiction over the duty of fair representation." Boyce, *Fair Representation, the NLRB, and the Courts* (1978), page 33.

thus not only warranting but requiring reversal by the Court of Appeals.

Hines held that where a claim of breach of the union's duty of fair representation has not been resolved and remains to be tried, a claim that there was a breach of contract by the employer may not be dismissed on a theory that the plaintiffs' discharges had been upheld in arbitration, and that has nothing whatever to do with the present case in which Petitioner's claims against the Union and the Company were tried together.

IV.

Petitioner's Argument That The Court Of Appeals Erred In Not Holding The Evidence Established A Breach Of The Fair Representation Duty Is Without Merit

The evidentiary standard to be applied was expressed by this Court in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971) as follows:

> "[F]or such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' Vaca v. Sipes, supra—There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' Humphrey v. Moore, supra— "[T]he fact that the doctrine—carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight."

There should be no dispute that the Court of Appeals was entitled to disapprove, not only the District Court's misapplication of the legal principles, but as well the District Court's reliance on a "fact" which indisputably was not a fact,

the District Court's post-trial creation of an issue, and the District Court's subjective assessment of hostility on the basis of courtroom appearance. With those points out of the way, there obviously was nothing which could be regarded as "substantial evidence."

Nevertheless, petitioner asks this Court to hold that the substantial evidence standard ought to have been satisfied by the Union Representative reviewing arbitration cases upholding discharges for fighting and by Petitioner allegedly being told the grievance had been denied by the arbitrator.

With respect to Petitioner's first argument, it should be noted that he has referred to only part of the evidence. The evidence was that the Union gave consideration to all of the facts, including "anything we could pull out of the file that would help us in arbitration of the case." (R. 29). So also, the Union gave consideration to the fact that the Company possessed signed statements by Union members who had told the Union their statements were true and declined to retract them, despite Petitioner's efforts to that end. (R. 120, 206-207).[13]

Similarly, accepting arguendo Petitioner's contention that he was told the grievance had been denied, that certainly does not constitute substantial evidence. To begin with, as the Court of Appeals observed, that would have occurred after the Union decision to withdraw the grievance. Furthermore, Petitioner has in no way contended it might have prejudiced him in any manner. Compare *Bazarte* v. *United Transportation Union,* 429

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[13]Incredibly, Petitioner now contends that the written statements support his claim that he was not the aggressor in the fight. (Petition at p. 20). Clearly, the statement of the closest eyewitness establishes that Petitioner struck the first blow. (R. 236). Moreover, if nothing else, each of the statements indicates that Petitioner actively participated in the fight. See *Fristoe* v. *Reynolds Metal Co.,* 615 F.2d 1209 (9th Cir. 1980).

F.2d 868 (3rd Cir. 1970). ("Nor is the union's failure to inform plaintiff of its decision not to go forward with the case enough to establish unfair representation, especially since there is no showing that this prejudiced him in any way.")

CONCLUSION

The crux of the present case is that the District Court decision was a glaring misapplication of the legal principles. The Court of Appeals was correct in reversing it and applied the settled legal principles in doing so.

In sum, the Court of Appeals' decision was correct and in full accordance with the governing principles, and it is accordingly submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

Lucien D. Gardner, Jr.
(Counsel of Record)

William F. Gardner

R. Boyd Miller

Attorneys for Respondent O'Neal Steel, Inc.

CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Telephone (205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Respondent O'Neal Steel in Opposition to Petition has been served by United States mail, postage prepaid, on Mr. Ralph E. Coleman, Suite 1311, 2121 Building, 2121 8th Avenue North, Birmingham, Alabama 35203, George C. Longshore, Cooper, Mitch & Crawford, Suite 201, 409 North 21st Street, Birmingham, Alabama 35203, and Mr. David M. Silberman, Bredhoff, Gottesman, Cohen & Weinberg, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036.

This the 17th day of September, 1980.

William F. Gardner

Supreme Court, U. S.
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No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

v.

O'NEAL STEEL, INC. AND UNITED STEELWORKERS OF AMERICA,

Respondents.

MEMORANDUM OF RESPONDENT UNITED STEELWORKERS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
DAVID M. SILBERMAN
Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE LONGSHORE
Cooper, Mitch & Crawford
409 N. 21st Street
Birmingham, Alabama 35203

Attorneys for Respondent United Steelworkers of America

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This case involves nothing more than the application of settled rules of law to a unique set of facts—facts which petitioner ignores in part and misstates in part in his petition for a writ of certiorari.[1] The rules were settled by this Court in *Vaca* v. *Sipes,* 386 U.S. 171 (1967) and have been reaffirmed by the Court on several occasions since. *E.g., Amalgamated Ass'n of Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976); *IBEW* v. *Foust,* 442 U.S. 42 (1978). The court below faithfully applied *Vaca* and its progeny to the particular facts of this case. Nothing in the decision below warrants plenary review by this Court.

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[1] To place before this Court all relevant facts, we are filing with this petition one copy of the appendix that was filed in the court of appeals and which contains most of the trial transcripts and exhibits. That appendix is cited herein as "C.A. App. ....." The appendix to the petition for a writ of certiorari is cited as "Pet. App. ....."

Judge Kravitch's opinion for the court below begins by recognizing, as this Court has repeatedly held, that "As exclusive collective bargaining agent for [petitioner], the union had a statutory duty to fairly and without hostility or discrimination represent his grievance. *Vaca* v. *Sipes,* 386 U.S. 171 (1967)" (Pet. App. A-3). At the same time Judge Kravitch recognized, as this Court also has held, that the union's duty "is not a ministerial one of satisfying each employee's demand at all costs"; rather, the union must "exercise judgment and discretion in its representative capacity" (*Id.*). As this Court recently put it:

> [U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing frivolous claims, and strengthens the employer's confidence in the union . . . Without these screening and settlement procedures . . . the costs of private dispute resolution could ultimately render the system impracticable. [*IBEW* v. *Foust, supra,* 442 U.S. at 51.]

Thus Judge Kravitch stated "[t]he key question" here as follows: "whether the union in this case abused its discretion and acted in an arbitrary or discriminatory manner or in bad faith when it decided not to proceed with arbitration of the plaintiff's grievance" (Pet. App. at A-3).[2]

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[2] The decision below is consistent not only with *Vaca* but with the prior fair representation decisions of the Fifth Circuit, decisions which in no way evidence a "consistent[] refus[al] to follow *Vaca* v. *Sipes* and *Hines* v. *Anchor Motor Freight, Inc.,*" as petitioner alleges (Pet. at 3). To the contrary, the Fifth Circuit has uniformly recognized, as it did here, that "[t]here is a duty of fair representation in all Union dealings implicit in the Congressional grant to unions . . . of the exclusive power to represent all employees in the collective bargaining unit." *Mumford* v. *Glover,* 503 F.2d 878, 882 (1974) (Goldberg, J.). The court has explained that "the duty is defined by three distinct standards of conduct": the "arbitrary," "discriminatory," and "bad faith" standards

The district court, of course, had framed the issue before it in similar terms (Pet. App. B-5). But in addressing that

established in *Vaca. Sanderson* v. *Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir. 1973); *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 957, n.6 (5th Cir. 1976). And with respect to the grievance processing context—the context in which this case arises—the court has stated that "It is beyond doubt that the duty of fair representation includes an obligation to investigate and to ascertain the merit of employee grievances," *Turner* v. *Air Transport Dispatchers Ass'n*, 468 F.2d 297, 299 (5th Cir. 1972), and that "a union may not arbitrarily ignore a meritous grievance or process it in a 110 (5th Cir. 1973); *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, perfunctory manner," *Lomax* v. *Armstrong Cork Co.*, 433 F.2d 1277, 1281 (5th Cir. 1970). Thus in *Lowe* v. *Pate Stevedoring Co.*, 558 F.2d 769, 771 n.2 (5th Cir. 1977), the court reversed a district court decision granting j.n.o.v. to a union, finding that "the jury . . . could reasonably have concluded that the union acted in "bad faith by perfunctorily processing Lowe's grievance. Such perfunctory treatment of a grievance constitutes a breach of the duty of fair representation."

Petitioner lists fourteen cases which, he claims, show that "The court below has consistantly [sic] failed to uphold findings of fair representation" (pet. at 12). In fact, in the overwhelming majority of the cases cited by petitioner the findings were precisely to the contrary, and the appellate court merely affirmed the district court's findings, twice by order, *Burchfield* v. *Steelworkers*, 577 F.2d 1018 (5th Cir. 1978), and *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir. 1971); three times by *per curiam* opinions, *Coe* v. *Rubber Workers*, 571 F.2d 1349 (5th Cir. 1978); *Franklin* v. *Crosby Typesetting Co.*, 568 F.2d 1098 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978); *Encina* v. *Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971); and four times by opinions authored by, respectively, Chief Judge Brown, and Judges Rubin, Clark, and Simpson, *Connally* v. *Transcon Lines*, 583 F.2d 199 (5th Cir. 1978); *Cox* v. *C. H. Masland & Sons*, 607 F.2d 138 (5th Cir. 1979); *Turner* v. *Air Transport Dispatcher Ass'n, supra;* and *Watson* v. *INT Teamsters*, 399 F.2d 875 (5th Cir. 1968). The remaining cases petitioner cites include one in which the court of appeals *reversed* a judgment *dismissing* a fair representation claim and remanded

issue, the district court had placed great weight on a factor which the court of appeals held is legally irrelevant under *Vaca:* the district court's own view of the merits of petitioner's grievance. And the court of appeals also held that, as a matter of law, the remaining evidence would not be sufficient to enable the district court to conclude that the union breached its duty here. Accordingly, the appellate court reversed the district court's decision and directed that judgment be entered for the union. As we proceed to show, the twin holdings of the court of appeals on which its judgment rests closely parallel *Vaca,* are entirely correct in their own right, and are not worthy of review by this Court.

1. In determining that the union had breached the duty of fair representation, the district court reasoned that since, in its view, petitioner "possessed an excellent chance of winning in arbitration" it "was certainly arbitrary for the Union not to proceed at least to the point of determining who the actual arbitrator would have been" (Pet. App. B-5). But in *Vaca* this Court explicitly rejected that approach to determining when the duty of fair representation has been breached. The *Vaca* Court explained that the successful operation of a grievance-arbitration procedure requires that a union be free to settle grievances short of

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the case for a trial on the claim, *Mumford* v. *Glover, supra;* one in which the court affirmed a judgment dismissing a § 301 action because plaintiff had *failed* to allege a breach of the duty, *Lomax* v. *Armstrong Cork Co., supra;* one in which the court remanded for a new trial after holding that the district court had erred in directing a verdict in plaintiff's favor, *Sanderson* v. *Ford Motor Co., supra;* and one in which the court overturned a preliminary injunction against a discharge on factual and legal grounds, *Bures* v. *Houston Symphony Society,* 503 F.2d 842 (5th Cir. 1974). In only one case was a final judgment in plaintiff's favor reversed, principally on legal grounds, *Tedford* v. *Peabody Coal Co., supra.* In none of the fourteen cases was there a dissent.

arbitration lest the grievance machinery become so "overburden[ed]" as to "prevent it from functioning successfully." *Id.* at 192. And the *Vaca* Court found that this freedom to settle grievances would be substantially impaired "if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious." *Id.* at 192-93. Accordingly, *Vaca* held that the lower court had erred in sustaining the jury verdict against the union in that case on the basis of evidence from which the jury could have concluded that, in its view, the plaintiff's grievance, which had been withdrawn before arbitration, was meritorious. *Id.* at 193. Thus, the court of appeals here, in likewise holding that the district court had "misapplied the test used to determine whether a union's failure to complete arbitration is a breach of its duty" (Pet. App. at A-2), was simply following the teaching of *Vaca.* This aspect of the decision below therefore presents no question worthy of this Court's review.

2. Having removed this legally erroneous prop from the district court's decision, the only remaining issue for the court of appeals to decide was whether the district court's judgment could stand on the legs that were left, *i.e.,* to determine whether, as a matter of law, the remaining evidence would support a conclusion that the union had breached its duty. That is precisely the inquiry this Court undertook in *Vaca,* after rejecting the lower court's legal theory. And the Fifth Circuit's conclusion here was the same as the conclusion reached by this Court in *Vaca:* "as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation." 386 U.S. at 193.

Of necessity, the appellate court's determination on this question is entirely dependent upon the particular facts of this case—facts which are unique and are not likely to

recur.[3] That is, of course, reason enough for denying the petition for a writ of certiorari. But as we now show, the

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[3] For the same reason, the decision below is not, as petitioner urges (Pet. at 8), in conflict with decisions of other circuits—decisions which depend on facts quite different from the facts involved here, and which therefore raised questions quite different from the question presented by this case. In *Ruzika* v. *General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), for example, the issue was whether the union's inadvertent failure to appeal a grievance to arbitration in a timely fashion breached the duty of fair representation; that question is not implicated here since, as we show, the union made a deliberate judgment that petitioner's grievance did not merit presentation in arbitration. Nor does this case present the question involved in *Robesky* v. *Quantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978), in which the court considered whether the union breached its duty by failing to advise plaintiff, before she decided whether to accept an offer of reinstatement without back pay, that the offer provided plaintiff her only chance of securing her job since her grievance already had been withdrawn. And while *Soto Segarra* v. *Sea Land Service, Inc.*, 581 F.2d 291 (1st Cir. 1978) and *Willets* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978), involved questions similar to the one posed here, the facts of those two cases are entirely distinguishable. In *Soto Segarra* the union, despite repeated requests (to which the union did not respond), refused to file a grievance over the discharge of plaintiff, who was a leading critic of the union, and "[n]o evidence even remotely indicated that the union's failure to process the grievance was based on investigation and evaluation of the merits," 581 F.2d at 295. In *Willetts*, the court merely stated, in *dictum*, that the district court should not have granted summary judgment against plaintiff where there was a factual conflict between his affidavit and the affidavits of union officers and where, if plaintiff's version of the facts were true, nothing was done with plaintiff's grievance and plaintiff was falsely told for five months that the grievance was pending. As we show below, the evidence adduced at the trial in the instant case shows that, in contrast to *Soto Segarra* and *Willets*, petitioner's grievance was processed through the steps leading to arbitration and was eventually withdrawn "based on an investigation and evaluation of the merits."

decision below is not only without general significance, but also entirely correct.

Petitioner and a fellow employee, Clarence Landrum, were discharged for fighting with each other at work.[4] This was the second time petitioner had been discharged by O'Neal Steel; on the first occasion, in 1971, the union filed a grievance on petitioner's behalf which was handled by staff representative William Caldwell (C.A. App. 102-103). In that grievance the arbitrator, while discrediting petitioner's testimony that he had done no wrong, ruled that the punishment of discharge was too severe in light of petitioner's work record as of that time (*Id.* at 216-24). Accordingly, the arbitrator gave petitioner a second chance by ordering him reinstated (without back pay).

Following his second discharge the union again filed a grievance for petitioner.[5] As part of its investigation of that grievance the union obtained from the company copies of sworn statements signed by witnesses to the fight; those statements indicated that petitioner struck the first blow (*Id.* at 236-39), (and *not,* as petitioner alleges, that petitioner "was merely defending himself" (Pet. at 16)). The union also interviewed each of the persons who had signed a statement; the witnesses all adhered to their state-

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[4] The district court stated that the fight occurred over a "calendar in the plaintiff's possession" which "Landrum attempted to take . . . from him" (Pet. App. B-3) and that petitioner "was acting in defense of his property." (*Id.* at B-7). What the district court neglected to mention, however, was that according to petitioner's own testimony, petitioner obtained "possession" of the calendar by taking it from a bench in the bathhouse where Landrum had placed it while dressing, and that prior to taking the calendar and walking off with it petitioner had never previously possessed it (C.A. App. 61-62, 84-85).

[5] Landrum told the union not to file a grievance for him since he believed that he and petitioner were both cupable and thus could not win grievances (C.A. App. 154-55).

ments and the eyewitness who was closest to the fight informed the union (as he later testified at trial (C.A. App. 138-39)), that petitioner started the fight and did so *before* Landrum brandished a knife (*Id.* at 44-45, 158, 162, 172, 179).[6] The grievance committee spoke, as well, to the two individuals whom petitioner claimed would support his version of the facts; those individuals told the union, however, *id.* at 49 (as petitioner ultimately conceded at trial, *id.* at 113), that they had not witnessed the fight. Finally, the union grievance committee, including Caldwell, met with petitioner for an hour to discuss the grievance and to reenact the fight (*Id.* at 115, 180).[7] In the course of the meeting the union advised petitioner that his grievance looked doubtful because of the statements of the witnesses to the fight (*id.* at 104-05); petitioner responded that the witnesses were liars and that the closest eyewitness would change his testimony (*Id.* at 179).

Petitioner's grievance was heard initially in the second

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[6] At trial, the district court cross-examined this eyewitness at some length, *id.* at 141-47, but was unable to shake his testimony. Notwithstanding this testimony (by a disinterested witness) and the testimony that petitioner had given a similar version of the fight to the union, see n.7, *infra*, the district court found that Landrum brandished the knife first (Pet. App. B-6).

[7] Caldwell, Grievance Committee Chairman Ford, and Local President Walters each testified that during the course of the committee meeting with petitioner, petitioner admitted that he had struck the first blow, and had done so before Landrum drew his knife (C.A. App. at 149, 168-69, 180-81). Bobby McCarle, the plant superintendent, testified that petitioner told him the same thing immediately before petitioner was discharged (*Id.* at 330). And all of the above-named witnesses, plus Personnel Director Hallmon (*Id.* at 231), testified that at the third step meeting petitioner admitted to striking the first blow. At trial, however, petitioner denied having made such a statement to the union, to McCarle, or at the third step meeting (*Id.* at 210). The district court did not resolve this conflict in the testimony.

step of the grievance procedure where it was denied by the company (*Id.* at 245).[8] The grievance was then appealed to the third step; petitioner met with the grievance committee before the third step meeting and attended the meeting along with his union representatives (*Id.* at 18). At the third step the union's argument that petitioner was not at fault was rejected by the company (*Id.* at 246). To meet the deadline for appealing the grievance to arbitration the union filed a protective appeal and began the process of selecting an arbitrator[9] while the union considered whether the grievance merited arbitration (*Id.* at 26). It was the union's practice carefully to screen grievances for arbitration; only a handful of cases were presented in arbitration each year (*id.* at 209-10), and between 1969 and 1976 only 10 discharge cases were heard in arbitration (*Id.* at 297).

Before deciding whether to present the grievance in arbitration, the union grievance committee met with Caldwell (*Id.* at 27).[10] Caldwell pulled prior discharge cases out of

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[8] Under the collective bargaining agreement, to expedite discharge grievances the first step of the grievance process could be bypassed.

[9] The district court's statement (Pet. App. B-4) that "the Union and [petitioner] were unable to agree upon a list of arbitrators" and that they obtained a list "from which [petitioner] and the Union would alternate striking names" is, of course, incorrect, as the appellate court recognized (*Id.* at A-3). It was the union and the *company* who could not agree on the list and who were to do the striking.

[10] Petitioner asserts in his petition that he did not receive notice of this meeting (Pet. at 13). At trial, Caldwell and Grievance Chairman Ford testified that they each personally notified petitioner of the time and place of the meeting and requested him to attend (C.A. App. 27, 171). Petitioner denied having received such notification. (*Id.* at 73). The district court did not resolve this conflict, and the court of appeals thought it unnecessary to resolve the conflict since, in any event, "lack of notice is not determinative on the issue of good faith" (Pet. App. at A-8).

the union's file looking for support for the union's position; none of the cases he found and reviewed with the committee were supportive (*Id.* at 29, 52).[11] The union also consulted with a union attorney and with a director of the International union (*Id.* at 152-53). Based on all the information before it—including the adverse witnesses and statements, the absence of any witnesses willing to state that Landrum was the aggressor, and the prior arbitration decision finding petitioner guilty of misconduct but offering him a second chance—the three-member committee unanimously decided that the grievance did not merit presentation in arbitration (*Id.* at 153).[12] Accordingly, the grievance was withdrawn.[13]

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[11] The petition alleges that "although [Caldwell] knew of cases where the discharge had been set aside under similar circumstances, these were not presented to the committee" (Pet. at 6). No citation is offered for this statement. The ommission is understandable: there is not one iota of evidence in the record which supports this assertion.

[12] The union's assessment of this grievance was confirmed at trial by an arbitrator called as an expert by the company who testified (contrary to the assertion in the petition (at 16)) that "the probable result in the arbitration of the case is that the discharge would be upheld" (C.A. App. 311).

[13] Petitioner attempts to make a great deal of the union's alleged misrepresentation in supposedly telling petitioner that his grievance had been lost in arbitration rather than withdrawn. At trial, Grievance Chairman Ford testified that immediately after the committee decided to withdraw the grievance (at the meeting which petitioner did not attend), he (Ford) called petitioner and so informed him. Ford further testified that petitioner then requested to talk with Caldwell (C.A. App. 174-75). Caldwell, who was present during Ford's phone call, confirmed Ford's testimony and Caldwell testified that he also told petitioner the grievance was being withdrawn during the same phone call (*Id.* at 30). And grievance committee member Jones testified that after the grievance was withdrawn petitioner called him to ask the reasons for the union's decision (*Id.* at 50). In his testimony, however, peti-

A word is required concerning the allegation that the union here was guilty of racial discrimination in withdrawing petitioner's grievance. Petitioner did not make any claim of racial discrimination in his complaint, in the pretrial order, in his trial testimony, or in his post-trial submissions. In fact, there was no mention of race at trial [14] except when the *district court* inquired as to the racial composition of the grievance committee (and learned that one-third of the members attending the final meeting were black) (*Id.* at 200). The racial discrimination issue was injected into this case, *sua sponte,* by the district court, months after trial had concluded. As the court of appeals found, the district court's "conclusory statement" attributing discriminatory motive to the union was "unsupported by any evidence" (Pet. App. A-5).

That the court of appeals concluded that this record would not support a finding of a breach of duty is hardly surprising. The record here contains no evidence of any discriminatory, arbitrary, or bad faith conduct on the part of the union.[15] Rather, what the evidence establishes in that the union diligently investigated the facts surrounding

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tioner, while recalling having received a call from Ford at about the time the grievance was withdrawn, maintained that he was informed in the call that the union "had taken my case to arbitration, and I didn't show up . . . and the arbitration turned my case down" (*Id.* at 73, 113). The district court accepted petitioner's recollection over the testimony of Caldwell, Ford and Jones and thus found that the union had misrepresented the disposition of the grievance (Pet. App. B-6). The court of appeals expressed skepticism about this finding but did not decide whether it was clearly erroneous "since the misrepresentation, if it took place, would have occurred *after* the alleged bad faith action [by the union]" (Pet. App. A-5) (emphasis in original).

[14] Thus there is not even evidence in the record to support the district court's assertion that the union was mostly white (Pet. App. B-4)—an assertion which is, in reality, contrary to fact.

[15] Indeed, in his petition for a writ of certiorari, petitioner him-

petitioner's grievance and reached a judgment as to the

self concedes (at 20) that "there is not doubt that [the grievance committee] attempted to make a reasonable decision based upon the material before them." Petitioner rests his entire claim, then, on Caldwell's alleged hostility. A brief comment on the state of the record with respect to Caldwell's "hostility" is thus in order.

Petitioner did not mention in his testimony at trial that Caldwell manifested any hostility towards him either in successfully handling the first discharge grievance or in processing the second discharge grievance. In fact, petitioner mentioned Caldwell only a few times in his testimony, once to describe a meeting with Caldwell, once to describe a phone call, and once to state Caldwell handled petitioner's prior discharge grievance (C.A. App. 70-74, 103, 106). Nor did Caldwell articulate any hostility towards petitioner. The issue of Caldwell's alleged hostility was injected into the case by the district court based solely upon what it perceived as Caldwell's hostile demeanor at trial; the court assumed that the hostility predated the filing of this action in which petitioner in effect challenged the manner in which Caldwell had performed his job.

The district court attempted to buttress its finding of hostility by attributing to Caldwell a remark which the court characterized as amounting to a " 'don't call us, we'll call you' " statement (Pet. App. B-6). In fact, as the court of appeals recognized (*Id.* at A-5), neither petitioner nor any other witness attributed any such remark to Caldwell. Petitioner testified that *Walters* (who did *not* attend the meeting at which the decision was made to withdraw petitioner's grievance (C.A. App. 29)), told petitioner to stop calling (*Id.* at 72); Walters testified that what he told petitioner was to stop calling late at night (*Id.* at 178). (In rebuttal petitioner denied calling late at night and stated that he usually called late in the afternoon and was told by Walters' wife when Walters would be home; in surrebuttal Walters testified that he was separated from his wife at the time and living alone (*Id.* at 210-12).)

In any event, as the court of appeals observed, "the trial judge did not find nor could he find on the record that Caldwell's hostility motivated the union to withdraw the grievance from arbitration. . . . [T]he demeanor of a witness at trial may be considered in evaluating the credibility of that witness, but it cannot by itself uphold a finding of union hostility" (Pet. App. A-5-6).

grievance's lack of merit—a judgment with which petitioner and the district court ultimately disagree. But as the court of appeals concluded, it simply cannot be said here "that the union's assessment that there was little chance of success was unreasonable" (Pet. App. A-17). Thus, the court's conclusion that on these unique facts no breach of the duty was established is unassailable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
DAVID M. SILBERMAN
Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE LONGSHORE
Cooper, Mitch & Crawford
409 N. 21st Street
Birmingham, Alabama 35203

Attorneys for Respondent United Steelworkers of America